Supreme Court, U.S.
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IN THE

Supreme Court of the United States

VICTOR MOLINA DE LA VILLA,

Petitioner,

—v.—

ERIC HOLDER,
ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In Section 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Congress repealed Immigration and Nationality Act Section 212(c), a provision that had given the Attorney General discretion to waive removal for immigrants convicted of certain offenses. In *INS v. St. Cyr*, 533 U.S. 289 (2001), this Court held, as a matter of statutory construction, that Section 304(b)'s repeal did not apply retroactively to the conviction at issue in that case, which was obtained by guilty plea prior to IIRIRA's enactment. The circuits have split deeply over whether the rule established in *St. Cyr* applies to people convicted by trial.

The question presented is:

Whether IIRIRA § 304(b)'s repeal of Section 212(c) – which under *St. Cyr* does not apply retroactively to persons previously convicted by guilty plea – nonetheless applies retroactively to some or all persons previously convicted by trial.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
TABLE OF AUTHORITIES iv
OPINIONS BELOW 1
JURISDICTION 1
STATUTORY PROVISIONS INVOLVED 1
STATEMENT 2
REASONS FOR GRANTING THE PETITION 10
I. The Courts of Appeals Have Splintered over the Question Whether IIRIRA's Repeal of Section 212(c) Applies to Pre-Enactment Convictions Obtained by Trial 13
A. The Third and Eighth Circuits Hold That IIRIRA § 304(b) Does Not Apply to Any Pre-Enactment Convictions ... 14
B. The Tenth Circuit Holds that IIRIRA's Retroactive Operation Turns on Whether Reliance Would Be Objectively Reasonable 16
C. The Second and Fifth Circuits Apply IIRIRA § 304(b) to Convictions Obtained After Trial Unless the Non-Citizen Can Show Subjective Reliance on Pre-Enactment Law 17

D. The First and Seventh Circuits Hold That IIRIRA's Repeal Provision Applies Categorically to All Pre-Enactment Convictions Obtained by Trial 18

E. The Fourth and Ninth Circuits Are Internally Divided Concerning the Proper Test for Retroactivity in the Immigration Context 19

II. The Circuit Conflict at Issue Merits Resolution by this Court, and this Case Provides an Appropriate Vehicle for Resolving It 22

A. The Conflict Is Important 22

B. This Case Properly Presents the Question for Decision 27

III. The Ninth Circuit's Decision Is Wrong 30

CONCLUSION 34

APPENDIX

Decision of the U.S. Court of Appeals for the Ninth Circuit denying Rehearing En Banc, dated June 4, 2009 ..... 1a

Decision of the U.S. Court of Appeals in the Ninth Circuit, dated January 5, 2009 ..... 2a

Decision of the Board of Immigration Appeals, dated February 18, 2004 ..... 8a

Decision of the Immigration Judge, dated Sept. 11, 2003 ..... 11a

Relevant Statutory Provisions 35a

TABLE OF AUTHORITIES

Cases

Abebe v. Mukasey,
554 F.3d 1203 (9th Cir. 2009) (en banc) 2

Armendariz-Montoya v. Sonchik,
291 F.3d 1116 (9th Cir.), *cert. denied*,
539 U.S. 902 (2003).....8, 10, 13, 21, 28

Atkinson v. Attorney General,
479 F.3d 222 (3d Cir. 2007).....14, 15, 16, 28

Camins v. Gonzales,
500 F.3d 872 (9th Cir. 2007) 26

Carranza-De Salinas v. Gonzalez,
477 F.3d 200 (5th Cir. 2007) 17, 28

Chambers v. Reno,
307 F.3d 284 (4th Cir. 2002) 20

Cruz-Garcia v. Mukasey,
285 F. App'x 446 (9th Cir.),
cert. denied. 129 S.Ct. 2424 (2009)..... 29

Dias v. INS,
311 F.3d 456 (1st Cir.),
cert. denied, 539 U.S. 926 (2003)..... 19, 28

Ferguson v. U.S. Attorney General,
563 F.3d 1254 (11th Cir.), *cert. pending*,
No. 09-263 (Sept. 30, 2009).....12, 18, 34

Fernandez-Vargas v. Gonzales,
548 U.S. 30 (2006)..... 12, 13

Francis v. INS,
532 F.2d 268 (2d Cir. 1976)..... 2

Hem v. Maurer,
458 F.3d 1185 (10th Cir. 2006).....16, 17, 20, 28

Hernandez de Anderson v. Gonzales,
497 F.3d 927 (9th Cir. 2007) 10, 21, 24

Hughes Aircraft Co. v. Schumer,
520 U.S. 939 (1997)..... 12, 15

INS v. St. Cyr,
533 U.S. 289 (2001).....*passim*

Kankamalage v. INS,
335 F.3d 858 (9th Cir. 2003) 27

Landgraf v. USI Film Products,
511 U.S. 244 (1994) .....*passim*

Lawrence v. Ashcroft,
540 U.S. 910 (2003)..... 28

Lovan v. Holder,
574 F.3d 990 (8th. Cir. 2009) 15, 16, 20

Martin v. Hadix,
527 U.S. 343 (1999)..... 12, 30

Mbea v. Gonzales,
482 F.3d 276 (4th Cir. 2007) 20

Molina-de La Villa v. Mukasey,
306 F. App'x 389 (9th Cir. 2009) 1

Montenegro v. Ashcroft,
355 F.3d 1035 (7th Cir. 2004) 19

Ng Fung Ho v. White,
259 U.S. 276 (1922)..... 25

Olatunji v. Ashcroft,
387 F.3d 383 (4th Cir. 2004) 10, 12, 20, 26, 33

Perriello v. Napolitano,
579 F.3d 135 (2d Cir. 2009) 23, 27

Ponnapula v. Ashcroft,
373 F.3d 480 (3d Cir. 2004) 14, 28, 32, 33, 34

Restrepo v. McElroy,
369 F.3d 627 (2d Cir. 2004) 17, 28

Rosenberg v. Fleuti,
374 U.S. 449 (1963) 6

Saravia-Paguada v. Gonzales,
488 F.3d 1122 (9th Cir.), *cert. denied,* 128 S. Ct. 2499 (2008) 10, 12, 13, 21, 29

Silva, Matter of
16 I. & N. Dec. 26 (BIA 1976) 2

Sinotes-Cruz v. Gonzales,
468 F.3d 1190 (9th Cir. 2006) 26

Thaqi v. Jenifer,
377 F.3d 500 (6th Cir. 2004) 27

Thom v. Ashcroft,
369 F.3d 158 (2d Cir. 2004) 18

Wilson v. Gonzales,
471 F.3d 111 (2d Cir. 2006) 17

Zamora v. Gonzales,
240 Fed. Appx. 150 (7th Cir.), *cert. denied sub nom.*, 128 S. Ct. 2051 (2008) 29

Federal Statutes and Regulations

8 U.S.C. 1101(a)(13) (1997) 26

8 U.S.C.A. 1101(a)(43) (1990) 5

8 U.S.C. 1101(a)(43)(F) (1997) 7

8 U.S.C.A. 1182(a)(9) (1990) 6

8 U.S.C.A. 1182(c), Immigration and Nationality Act § 212(c) (1990) 6

8 U.S.C. 1182(c), Immigration and Nationality Act § 212(c) (1995) (repealed 1996) ..... *passim*

8 U.S.C. 1229b (1997) 3

8 U.S.C. 1229b(d) (1997) 26

8 U.S.C.A. 1427 (1990) 6

8 U.S.C.A. 1251(a)(4) (1990) 5

28 U.S.C. 1254(1) 1

Anti-terrorism and Effective Death Penalty Act, Pub. L. No. 104-132, § 440(d), 110 Stat. 1277 (1996) 3, 7, 27

Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009-597 (1996)

§ 304(b) ..... *passim*

§ 321(c) 7

Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 5052 (1990)

§511(a) 2, 6

§501(a)(3) 6

§501(b) 7

8 C.F.R. 1212.3(h) (2004) 28

State Statutes

Cal. Penal Code § 220 (1990) 5

Cal. Penal Code § 1203.4 (1998) 5

Other Authorities

Executive Office for Immigration Review, U.S. Dep't of Justice, FY 2008 Statistical Year Book (2009), http://www.justice.gov/eoir/statspub/fy08syb.pdf 23

Nancy Morawetz, *Determining the Retroactive Effect of Laws Altering the Consequences of Criminal Convictions*, 30 FORDHAM URB. L.J. 1743 (2003) 31

OPINIONS BELOW

The court of appeals' decision is unreported, but available at *Molina-de la Villa v. Mukasey*, 306 F. App'x 389 (9th Cir. 2009). *See also* Petitioner's Appendix (hereinafter "Pet. App.") 2a-7a. The decisions of the Board of Immigration Appeals and the Immigration Judge are unreported. *See* Pet. App. 8a-10a, 11a-34a.

JURISDICTION

The court of appeals entered its judgment on January 5, 2009, and denied a petition for rehearing en banc on June 4, 2009. On August 25, 2009, Justice Kennedy extended the time in which to file a petition for a writ of certiorari to and including October 2, 2009. On September 23, 2009, Justice Kennedy further extended the time for filing to and including November 1, 2009. This Court has jurisdiction under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced at Pet. App. 35a-36a.

STATEMENT

1. Prior to 1996, a non-citizen convicted of certain otherwise-removable offenses was entitled to seek a discretionary waiver of removal from the Attorney General under Section 212(c) of the Immigration and Nationality Act. That Section authorized the Attorney General to waive removal for non-citizens who had a "lawful unrelinquished domicile of seven consecutive years." 8 U.S.C. 1182(c) (repealed 1996); *see generally INS v. St. Cyr*, 533 U.S. 289, 294-96 (2001) (discussing history of discretionary relief under former Section 212(c)).[1] In 1990, Congress amended Section 212(c) to bar non-citizens who served more than five years' imprisonment for aggravated felony convictions from seeking the waiver. *See* Immigration Act of 1990 (hereinafter "IMMACT"), Pub. L. No. 101-649, § 511(a), 104 Stat. 5052 (1990); 8 U.S.C. 1182(c) (1995).

Section 212(c) played a significant role in immigration proceedings. More than half of all

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[1] Prior to 1996, removable offenses were classified as either "excludable" or "deportable" depending on whether the non-citizen was arrested at the border or after entry into the United States. Relief under Section 212(c) was initially limited to non-citizens arrested at the border, but was subsequently extended to non-citizens arrested within the United States. *See Matter of Silva*, 16 I. & N. Dec. 26, 30 (BIA 1976); *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976). Because Mr. Molina was arrested at the border and charged with grounds of inadmissibility, the validity of the rule extending 212(c) relief to people found within the country is not at issue in this case. *See Abebe v. Mukasey*, 554 F.3d 1203 (9th Cir. 2009) (en banc).

applications were granted in the years preceding its repeal. *St. Cyr*, 533 U.S. at 296, 296 n.5.

In 1996, Congress revised the immigration laws in two different federal statutes. In Section 440(d) of the Anti-terrorism and Effective Death Penalty Act (hereinafter "AEDPA"), Pub. L. No. 104-132, 110 Stat. 1277, Congress foreclosed Section 212(c) relief for non-citizens convicted of any aggravated felonies. Later that same year, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (hereinafter "IIRIRA"), which both greatly expanded the definition of what constitutes an "aggravated felony" and repealed the Attorney General's waiver authority under Section 212(c) altogether. Pub. L. No. 104-208, § 304(b), 110 Stat. 3009-597. Congress replaced Section 212(c) with a narrower waiver provision which is unavailable to anyone "convicted of any aggravated felony." 8 U.S.C. 1229b (1997).

In *INS v. St. Cyr*, 533 U.S. 289 (2001), this Court held that IIRIRA § 304(b)'s repeal of Section 212(c) did not apply retroactively to the conviction at issue in that case, which was obtained by guilty plea prior to IIRIRA's enactment. Following the familiar two-step approach to retroactivity analysis from *Landgraf v. USI Film Products*, 511 U.S. 244, 265-266 (1994), the Court first considered whether Congress had clearly expressed an intent to apply Section 304(b) retroactively. After analyzing the statute's structure and several neighboring provisions, the Court held that IIRIRA contained no "clear indication from Congress that it intended such a [retroactive] result." *St. Cyr*, 533 U.S. at 316.

Proceeding to the second step of the *Landgraf* test, the Court then considered whether the repeal of Section 212(c) relief would have a "retroactive effect" on St. Cyr's "deci[sion] whether to accept a plea offer or instead to proceed to trial." *St. Cyr*, 533 U.S. at 323. The Court concluded that it did, holding that it "attache[d] a new disability, in respect to transactions or considerations already past." *St. Cyr*, 533 U.S at 321 (quoting *Landgraf*, 511 U.S. at 269). The Court then referred to several different factors in explaining this conclusion. These included that non-citizens like St. Cyr engaged in a *quid pro quo*, giving up their right to trial in exchange for a perceived benefit; that non-citizens deciding whether or not to plead guilty were, "as a general matter," well-aware of the immigration consequences associated with their decision; and that many people like St. Cyr had pled guilty to a deportable offense relying on the fact that doing so preserved their ability to apply for discretionary relief under Section 212(c). *Id.* at 321-24. For these reasons, the Court concluded that "the elimination of any possibility of § 212(c) relief by IIRIRA has an obvious and severe retroactive effect." *Id.* at 325; *see also id.* at 323 (describing the potential unfairness involved as "significant and manifest"). The Court therefore construed the statute not to apply retroactively to bar St. Cyr's application for discretionary relief under Section 212(c).

2. Petitioner Victor Molina was first admitted to the United States as a student in 1974. Pet'r-Appellant's Opening Br. C.A.9, No. 04-71033, at 5. He married his wife, a native-born U.S. citizen, in 1977. *Id.* He adjusted to lawful permanent resident status in 1980. *Id.* Over the course of the next several years the couple had three children, all of

whom are citizens residing in the United States. Mr. Molina was the primary breadwinner for his wife and three children. *Id.* at 7.

Nearly twenty years ago, on February 2 1990, Mr. Molina was convicted, following a jury trial, of assault with intent to commit rape, in violation of California Penal Code § 220. At the time of sentencing, the judge granted him the equivalent of a downward departure, as he found "unusual reasons" justifying a lenient sentence. Pet'r-Appellant's Opening Br. C.A.9, No. 04-71033, at 8-9. As a result, Mr. Molina received a sentence of six years suspended to 365 days of county jail followed by probation. He ultimately spent approximately six months in county jail prior to his release. *Id.* at 9. After his release, he successfully completed probation without incident. *Id.*[2]

Mr. Molina was never arrested or convicted pursuant to any criminal law ever again. In 1998, the California Superior Court judge who had originally sentenced him granted his motion for an expungement under California Penal Code § 1203.4. Subject to limited exceptions, this expungement "set aside" the guilty verdict under state law, and released Mr. Molina "from all penalties and disabilities resulting from the offense of which he [] has been convicted." *Id.* at 9.

At the time of Mr. Molina's conviction, his offense did not render him deportable. *See* 8 U.S.C.A. 1251(a)(4); 1101(a)(43) (1990) (grounds of

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[2] The maximum sentence authorized for that offense was six years' imprisonment. CAL. PENAL CODE § 220 (1990).

deportability included aggravated felonies, but the aggravated felony definition did not include crimes of violence, although it did include, *inter alia*, murder and arms trafficking). However, it did subject him to two other immigration consequences. First, it barred him from naturalizing for a period of at least five years. *See* 8 U.S.C.A. 1427 (1990) (requiring showing of "good moral character" for five years preceding application date). Second, it made him excludable from the United States, but only if he were to travel abroad in a way that "meaningfully interrupted" his residence here. *See* 8 U.S.C.A. 1182(a)(9) (1990) (grounds of exclusion included "crimes involving moral turpitude"); *Rosenberg v. Fleuti*, 374 U.S. 449, 462 (1963) (lawful permanent residents returning from "meaningfully interruptive" travel abroad could be excluded upon return based on grounds of excludability). However, even if he were found subject to such exclusion, his conviction would not have precluded him from applying for discretionary relief from the ground of exclusion under Section 212(c).[3]

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[3] Mr. Molina easily met the eligibility requirements for Section 212(c) relief at the time of his conviction because he had already resided lawfully in the United States for more than seven consecutive years. *See* Pet'r-Appellant's Opening Br. C.A.9, No. 04-71033, at 5. At the time of his conviction, Section 212(c) contained no other eligibility requirements. *See* 8 U.S.C.A. 1182(c) (1990). In November 1990, Congress expanded the definition of an aggravated felony to include, *inter alia*, crimes of violence, and also enacted a criminal history requirement into Section 212(c), after which an applicant had to have served less than five years for any aggravated felony convictions in order to qualify. *See* IMMACT § 501(a)(3), § 511(a). Even after Congress enacted those new rules in 1990, Mr. Molina still easily

3. Six years after Mr. Molina's conviction, Congress passed amendments to the immigration laws that drastically altered the consequences of Mr. Molina's conviction. First, Section 440(d) of AEDPA eliminated Section 212(c) relief for people convicted of aggravated felonies, regardless of the length of time they served for those aggravated felonies. Then IIRIRA § 321(c) re-classified Mr. Molina's conviction as an aggravated felony, by specifying that any conviction for a crime of violence with a term of imprisonment of at least one year constituted an aggravated felony, and by applying that re-classification unambiguously to convictions entered before, on, or after the date of the statute's enactment. 8 U.S.C. 1101(a)(43)(F) (1997); IIRIRA § 321(c). [4] Most important, IIRIRA § 304(b) then repealed Section 212(c) relief altogether (and therefore AEDPA § 440(d) as well), thus eliminating all discretionary relief for people convicted of the more broadly defined category of aggravated felonies.

The retroactivity of this statutory repeal is the central issue presented by this petition. As a result of Section 304(b), people convicted after IIRIRA of aggravated felonies are clearly subject to mandatory deportation, because IIRIRA not only expands the

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qualified for Section 212(c) relief, because the new definition of "aggravated felony" explicitly did not apply retroactively to pre-enactment convictions, IMMACT § 501(b), and because he did not *serve* more than five years for his conviction.

[4] Because Congress clearly set forth this provision's temporal scope, Petitioner does not dispute that his conviction is properly classified as an aggravated felony, even though it pre-dates IIRIRA's passage.

definition of "aggravated felony," but also eliminates discretionary relief from removal for aggravated felons. However, the government contends that IIRIRA also requires the mandatory deportation of people convicted *before* its enactment, where that conviction occurred by trial.

4. Unaware of the potential effects of these legal changes, Mr. Molina traveled to Colombia to visit his family in 1998 and returned without incident. Pet'r-Appellant's Opening Br. C.A.9, No. 04-71033, at 9. He traveled to visit them again in March 2002 and again returned without incident. However, when he returned from a third visit in November 2002, he was arrested at the airport and charged with being removable based on his 1990 conviction. *Id.* at 5-6.

At his removal proceedings, Mr. Molina applied for relief under Section 212(c) and argued that he could show that he relied on the availability of such relief in making the decision to go to trial. After allowing Mr. Molina's attorney to make a brief proffer, the Immigration Judge held as a matter of law that Mr. Molina's prior conviction after a trial rendered him both inadmissible and ineligible for all discretionary relief from removal. Pet. App. 16a-18a.

The Board of Immigration Appeals affirmed the Immigration Judge's decision, relying on Ninth Circuit precedent holding that non-citizens convicted by trial cannot show retroactive effect. Pet. App. 9a (citing *Armendariz-Montoya v. Sonchik*, 291 F.3d 1116, 1121 (9th Cir. 2002)).

Mr. Molina then raised two closely-related challenges to his removal order. He first challenged the agency's decision to apply retroactively an IIRIRA

provision classifying him as an alien seeking admission, rather than as a returning lawful permanent resident, based on his pre-1996 conviction. *See* Pet'r-Appellant's Opening Br. C.A.9, No. 04-71033, at 26. He also challenged the agency's conclusion that he was ineligible for Section 212(c) relief based on retroactive application of IIRIRA § 304(b). Pet'r's Opening Br. C.A.9, No. 05-74126, at 12-39. With respect to both challenges, the central issue concerned whether the IIRIRA provisions could be applied retroactively to his conviction given that he was convicted by trial rather than by guilty plea.

5. The Ninth Circuit denied Mr. Molina's petition for review in an unpublished disposition holding that he could not show that he had suffered impermissible retroactive effect because he had been convicted by trial. Specifically, the Court held that "we require that an alien must demonstrate some affirmative reliance on a previously available immigration benefit to show impermissible retroactivity." Pet. App. 5a. It then concluded that Mr. Molina could not make that showing: "[b]y simply going to trial, Molina showed no affirmative reliance on the state of the law at the time." *Id.*; s*ee also id.* at 5a-6a ("[b]ecause he took no affirmative action that enhanced the significance of section 212(c) to him in particular, he cannot claim to have reasonably relied on it.").[5]

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[5] The Ninth Circuit made no reference to the proffer regarding reliance made by Mr. Molina's attorney. Instead, it concluded simply that he could not show retroactive effect on the existing record. Pet. App. 5a-6a.

In reaching this conclusion, the Ninth Circuit relied on its precedent decision in *Saravia-Paguada v. Gonzales*, 488 F.3d 1122, 1130-31 (9th Cir. 2007), which in turn reaffirmed its prior decision in *Armendariz*. As the Ninth Circuit explained its rule in *Saravia*, it has "excluded categorically claims for § 212(c) relief outside the guilty plea context." *Saravia*, 488 F.3d at 1131.

The Ninth Circuit denied Mr. Molina's petition for rehearing en banc.[6] Pet. App. 1a.

REASONS FOR GRANTING THE PETITION

This Court's review is necessary to resolve an intractable circuit conflict on an important federal question. As Judge Luttig explained, the conflict arises from "substantial confusion" in the courts of appeals "as to whether a party must prove some form of reliance in order to demonstrate that a statute is impermissibly retroactive." *Olatunji v. Ashcroft*, 387 F.3d 383, 390 (4th Cir. 2004). The differing views of the court of appeals – four different views in ten circuits – will continue to affect thousands of non-citizens across the country for years to come.

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[6] After *Saravia* but before the decision below in Petitioner's case, the Ninth Circuit held that a non-citizen convicted by trial could establish retroactive effect by showing some post-trial conduct in reliance on the continued availability of 212(c) relief. *See Hernandez de Anderson v. Gonzales*, 497 F.3d 927 (9th Cir. 2007). As explained *infra* pp. 20-21, there is substantial tension between the rule described in *Hernandez de Anderson* and the prior rule set forth in *Saravia* and *Armendariz*, but, in any event, both rules deeply conflict with the law in several other circuits, and both are incorrect. Petitioner moved for rehearing en banc on this basis. Pet. App. 1a.

The confusion has arisen most acutely in cases applying *St. Cyr* to cases involving non-citizens convicted by trial. *St. Cyr* held that IIRIRA's provision repealing Section 212(c) relief did not apply retroactively to alter the immigration consequences of the conviction at issue there, which arose from a guilty plea to a pre-1996 conviction. *St. Cyr*, 533 U.S. at 326. Like *St. Cyr*, this case also involves a lawful permanent resident whose pre-IIRIRA conviction preserved his eligibility for Section 212(c) relief under prior law, but rendered him ineligible under IIRIRA's scheme. The only difference is that St. Cyr's conviction was obtained by guilty plea, while Mr. Molina was convicted by trial.

Based on that single difference in how non-citizens' convictions were obtained, the circuit courts have adopted widely varying rules concerning whether IIRIRA § 304(b) applies retroactively. Some courts hold that the statute does not operate retroactively regardless of whether the non-citizen was convicted by plea or by trial, while others hold exactly the opposite, treating the manner of conviction as dispositive. There are also two intermediate approaches, one of which examines whether non-citizens can prove that they actually relied on the law at the time they decided to go to trial, while the other focuses only on whether a reasonable person would have so relied. As a result, IIRIRA § 304(b) now operates in dramatically different ways in different circuits, resulting in profoundly life-altering differences in the law's effect

in thousands of cases, based on nothing more than the location in which removal proceedings occur.[7]

More broadly, the conflict in the circuits here is simply the most acute example of widespread confusion in the courts of appeals regarding the proper test for determining whether a statute should apply retroactively in the immigration context. *See infra* pp. 25-27 (describing analogous problem arising under other similar immigration statutes).

The courts of appeals' confusion is rooted in conflicting interpretations of this Court's precedent. Although this Court has repeatedly declined to announce an exhaustive list of the circumstances that can give rise to retroactive effect, some of its decisions have emphasized the importance of reliance, while others have focused instead on the attachment of new legal consequences to past acts. *See Saravia*, 488 F.3d at 1133 (arguing that an affirmative showing of reliance is required to establish retroactive effect because "the central focus of *Hadix* and *St. Cyr*, both of which post-date *Landgraf* and *Hughes Aircraft*, was the party's reliance interest"); *see also Olatunji*, 387 F.3d at 390 ("[t]his confusion exists within the Supreme Court, in its decisions postdating *Landgraf*."). Accordingly, only this Court's intervention can provide clarity in this important area.[8]

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[7] The same legal issue is also before the Court in *Ferguson v. U.S. Atty. Gen.*, 563 F.3d 1254 (11th Cir. 2009), *cert. pending*, No. 09-263.

[8] One of this Court's descriptions of the claim at issue in *Fernandez-Vargas*, the most recent case involving retroactivity

I. The Courts of Appeals Have Splintered over the Question Whether IIRIRA's Repeal of Section 212(c) Applies to Pre-Enactment Convictions Obtained by Trial.

The courts of appeals are deeply divided over the question whether Section 304(b) applies retroactively to alter the consequences of convictions obtained by trial rather than by guilty plea. The lower courts have adopted four distinct approaches.

Two circuits have held that IIRIRA's repeal of Section 212(c) should not be construed to apply retroactively to convictions entered prior to its enactment – whether by guilty plea or by trial – because in both contexts retroactive application attaches "new legal consequences" to the conviction. Another circuit has held that Section 304(b) should not apply retroactively where an objectively reasonable person would have relied on its availability in his or her decision making.

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in the immigration context, appears to make clear that retroactive effect can arise *either* because application of the new rule upsets reliance interests *or* because it attaches new legal consequences to past acts, but this statement has not served to resolve the circuit split. *Compare Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 44 n.10 (2006) ("[w]e understand *Fernandez-Vargas*'s claim as falling within the second of Justice Story's categories of retroactivity (new consequences of past acts), not the first category of canceling vested rights.") *with Saravia*, 488 F.3d at 1134 ("the *Fernandez-Vargas* decision thus reinforces the central premise in *Armendariz-Montoya* that an alien must demonstrate some affirmative reliance on a previously available immigration benefit to show impermissible retroactivity.").

Two circuits have ruled that non-citizens convicted by trial can establish retroactive effect, but only if they can affirmatively show that they relied on the availability of such relief when engaging in some post-trial conduct, and a third circuit seems likely to follow this approach. Two other circuits have held that application of IIRIRA's repeal of Section 212(c) relief creates no retroactive effect on the decision to go to trial, such that conviction by trial appears to categorically foreclose any claim concerning retroactive effect in these circuits. Finally, two other circuits have internally inconsistent law on the issue.

This deep and widespread conflict among the circuits on an important and recurring issue of federal law can only be resolved by this Court.

A. The Third and Eighth Circuits Hold that IIRIRA § 304(b) Does Not Apply to Any Pre-Enactment Convictions.

In a comprehensive opinion, the Third Circuit construed IIRIRA § 304(b)'s repeal of the Attorney General's waiver authority as not applying retroactively to convictions entered before the statute's enactment. *See Atkinson v. Attorney General*, 479 F.3d 222 (3d Cir. 2007).[9] The Eighth Circuit has explicitly adopted the Third Circuit's

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[9] Even prior to *Atkinson*, the Third Circuit had recognized that non-citizens may rely on the state of the law in effect at the time of their decision to go to trial, and thereby suffer retroactive effect when the consequences of that conviction are changed long after that decision was made. *See Ponnapula v. Ashcroft*, 373 F.3d 480 (3d Cir. 2004) (holding that non-citizen who chose to go to trial in reliance on immigration consequences of conviction at that time could show retroactive effect).

approach. *Lovan v. Holder*, 574 F.3d 990, 994 (8th. Cir. 2009).

Contrary to the Ninth Circuit's holding in this case, the Third Circuit recognized that "[n]owhere in the Supreme Court's jurisprudence . . . has reliance (or any other guidepost) become the *sine qua non* of the retroactive effects inquiry." *Atkinson*, 479 F.3d at 231. For example, as the Third Circuit explained, in *Landgraf* itself this Court concluded that applying a new punitive damages remedy to pre-enactment sex discrimination would have had a retroactive effect, even though it was implausible to think that the absence of a punitive damages remedy would have informed or influenced an employer's decision whether to engage in long-outlawed sex discrimination in the workplace. *Id.* at 228. *See also id.* at 229 (noting that Court found retroactive effect without strong evidence of reliance in *Hughes Aircraft Co. v. Schumer*, 520 U.S. 939, 947 (1997)).

The Third Circuit thus recognized that, while "reliance" "is an element to consider in determining whether the enactment of a new law" has a retroactive effect, cases like *Landgraf* and *Hughes* demonstrate that "whether the party before the court actually relied on the prior state of the law is not the conclusive factor." *Atkinson*, 479 F.3d at 229.

After rejecting the claim that reliance is a necessary prerequisite to finding retroactive effect, the Third Circuit focused on whether the elimination of Section 212(c) relief "plainly attached new legal consequences to [the non-citizen's] conviction." *Atkinson,* 479 F.3d at 230. The court concluded that it did, because under IIRIRA the conviction at issue would result in *certain* deportation, whereas at the

time of the conviction it would have resulted only in *possible* deportation that could have been avoided through a successful application for Section 212(c) relief. *Id.* at 224; *see also St. Cyr*, 533 U.S. at 325 ("[t]here is a clear difference, for the purposes of retroactivity analysis, between facing possible deportation and facing certain deportation.").

The Eighth Circuit recently adopted the Third Circuit's position, holding that application of Section 304(b) to people convicted by trial prior to IIRIRA's enactment attaches a new legal consequence to their conviction. *See Lovan v. Holder*, 574 F.3d 990, 994 (8th. Cir. 2009). In doing so, the Eighth Circuit explicitly adopted the rule and the reasoning of the Third Circuit. *Id.* at 993-94.

B. The Tenth Circuit Holds that IIRIRA's Retroactive Operation Turns on Whether Reliance Would Be Objectively Reasonable.

The Tenth Circuit has agreed with the Third and Eighth Circuits that IIRIRA's repeal of discretionary relief can have a retroactive effect when applied to pre-1996 convictions obtained by trial. However, the Tenth Circuit requires a showing that an "objectively reasonable" person would have relied upon the pre-existing law in order to establish a retroactive effect. As long as the non-citizen belongs to a class of individuals for whom reliance on the availability of Section 212(c) would be "objectively reasonable," the Tenth Circuit will construe the statute as not applying retroactively. *Hem v. Maurer*, 458 F.3d 1185, 1199 (10th Cir. 2006). Thus, in *Hem*, the non-citizen prevailed on his retroactivity claim because he could reasonably have relied on the availability of

discretionary relief in deciding to forego his appeal after conviction by trial. *Id.* at 1200; s*ee also id.* at 1200 n. 5 (stating that other classes of non-citizens could also establish retroactive effect despite having gone to trial).

C. The Second and Fifth Circuits Apply IIRIRA § 304(b) to Convictions Obtained After Trial Unless the Non- Citizen Can Show Subjective Reliance on Pre-Enactment Law.

The Second and Fifth Circuits, in further contrast, have adopted a third rule, holding that IIRIRA's repeal of Section 212(c) can have a retroactive effect on convictions obtained by trial, but only where the non-citizen can make an individualized showing that he or she actually relied on the availability of Section 212(c) relief prior to its repeal. *Wilson v. Gonzales*, 471 F.3d 111, 122 (2d Cir. 2006) (requiring an "individualized showing of reliance" by non-citizens if convicted by trial) (citing *Restrepo v. McElroy*, 369 F.3d 627, 634 (2d Cir. 2004)); *Carranza-De Salinas v. Gonzalez*, 477 F.3d 200, 205 (5th Cir. 2007) ("this circuit requires an applicant who alleges continued eligibility for § 212(c) relief to demonstrate actual, subjective reliance on the pre-IIRIRA state of the law to be eligible for relief from its retroactive application."). Under the rule in these circuits, a non-citizen could show retroactive effect by establishing, for example, that he or she delayed applying for Section 212(c) relief in order to establish a history of rehabilitation. *Carranza-De Salinas*, 477 F.3d at 206; *Restrepo*, 369 F.3d at 633. However, non-citizens convicted by trial prior to IIRIRA's enactment who cannot make such a showing are subject to the IIRIRA rule, even though

their convictions occurred prior to the statute's enactment.[10]

In addition, the Eleventh Circuit has recently held that non-citizens convicted by trial cannot establish retroactive effect. *Ferguson v. U.S. Atty. Gen.*, 563 F.3d 1254, 1271 (11th Cir. 2009), *cert. pending*, No. 09-263 (holding that "we decline to extend *St. Cyr* to aliens who were convicted after a trial because such aliens' decisions to go to trial do not satisfy *St. Cyr*'s reliance requirement."). The Eleventh Circuit did not decide whether it would adopt the exception for affirmative reliance, as had the Second and Fifth Circuits. *Id.* at 1270-71, 1271 n. 28.

D. The First and Seventh Circuits Hold That IIRIRA's Repeal Provision Applies Categorically to All Pre-Enactment Convictions Obtained by Trial.

The First and Seventh Circuits have held that a defendant convicted after a trial is categorically ineligible for Section 212(c) relief on the ground that a guilty plea, rather than conviction at trial, is an indispensable prerequisite to finding that IIRIRA's repeal operates with disfavored retroactivity. *See*

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[10] Writing only for himself, Judge Calabresi has stated that he would adopt a view more closely akin to the Third Circuit's view were it not for prior Second Circuit precedent. *Thom v. Ashcroft*, 369 F.3d 158, 163 n.6 (2d Cir. 2004) (arguing that retroactive effect exists at least whenever the new consequence would be impermissible under the Ex Post Facto Clause in a criminal case). Judge Underhill dissented in *Thom*, arguing that reliance is not a prerequisite to a finding of retroactive effect. *Id.* at 167 (Underhill, J., dissenting).

Dias v. INS, 311 F.3d 456, 458 (1st Cir. 2002); *Montenegro v. Ashcroft*, 355 F.3d 1035, 1037 (7th Cir. 2004). Those courts of appeals have read *St. Cyr*'s holding concerning IIRIRA § 304(b)'s retroactive operation to turn fundamentally on whether the non-citizen gave up his or her right to trial in presumed reliance upon the availability of Section 212(c) relief. Because the decision to go to trial would not entail that same presumed *quid pro quo*, those circuits have concluded that the repeal of Section 212(c) can be applied to convictions that pre-date IIRIRA's enactment without creating a retroactive effect. *See Dias*, 311 F.3d at 458; *Montenegro*, 355 F.3d at 1037.[11]

E. The Fourth and Ninth Circuits Are Internally Divided Concerning the Proper Test for Retroactivity in the Immigration Context.

Underscoring the deep confusion in the lower federal courts on this issue, two circuits – the Fourth and Ninth – remain internally divided on the proper test for analyzing retroactivity claims in this context.

The Fourth Circuit has adopted conflicting rules concerning retroactive effect. In a case presenting the same question at issue here, the Fourth Circuit held that IIRIRA § 304(b) can be applied retroactively to people convicted by trial without creating a

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[11] The Seventh Circuit has created a very limited exception to its otherwise categorical rule for people who conceded deportability before the repeal of Section 212(c) in reliance on the possibility of obtaining relief. *See Montenegro*, 355 F.3d at 1037.

retroactive effect. *Chambers v. Reno*, 307 F.3d 284, 293 (4th Cir. 2002). In doing so, the Fourth Circuit held that reliance was critical to establishing retroactive effect. "An alien in Chambers' position [i.e., convicted by trial prior to IIRIRA's enactment], however, does not have a reliance interest comparable to that which was at the heart of *St. Cyr*." *Id.* at 290. Subsequently, however, the Fourth Circuit held that reliance is not required to show retroactive effect in a case analyzing a different provision of IIRIRA. *See Olatunji v. Ashcroft*, 387 F.3d 383, 396 (4th Cir. 2004). *Olatunji* held that IIRIRA's new rule governing the treatment of returning lawful permanent residents does not apply retroactively to people convicted prior to the law's enactment because the new rule "attache[s] new legal consequences" to an immigrant's pre-enactment "conviction." *Id.* at 396. In reaching that conclusion, the Fourth Circuit held that "reliance, in any form, is irrelevant to the retroactivity inquiry." *Id.* Nevertheless, the Fourth Circuit did not revisit its earlier holding concerning Section 304(b) in light of *Olatunji*'s reasoning. On the contrary, it subsequently reaffirmed its holding in *Chambers* in a published opinion that did not cite *Olatunji*. *See Mbea v. Gonzales*, 482 F.3d 276 (4th Cir. 2007).[12]

The Ninth Circuit has also adopted conflicting rules concerning the appropriate test for determining

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[12] The Tenth Circuit has noted that "there is tension between *Olatunji* and *Chambers*," *Hem v. Maurer*, 458 F.3d 1185, 1192 n. 4 (10th Cir. 2006), while the Eighth Circuit has described the Fourth Circuit's position as "unclear." *Lovan*, 574 F.3d at 993 n.1.

retroactive effect in this context. As noted above, the Ninth Circuit held in *Saravia* that "[o]utside of the plea bargain context, however, we have declined to invalidate retroactive elimination of Section 212(c) relief." *Saravia*, 488 F.3d at 1131; *see also id.* (holding that the Ninth Circuit has "excluded categorically claims for § 212(c) relief outside the guilty plea context").

However, the Ninth Circuit appears to have adopted a different rule in a later case involving a different form of immigration relief. In *Hernandez de Anderson v. Gonzales*, 497 F.3d 927, 942 (9th Cir. 2007), that court held that a non-citizen convicted by trial, prior to IIRIRA's enactment, of an offense that rendered her ineligible to apply for suspension of deportation could nonetheless establish retroactive effect with respect to her decision to apply for naturalization. In doing so, the Ninth Circuit endorsed an objective reliance standard, and purported to distinguish its prior decisions in *Saravia* and *Armendariz* on the grounds that the petitioners in those cases could not have prevailed under an objective reliance test. *Hernandez de Anderson v. Gonzales*, 497 F.3d at 943. *But see id.* at 944 (Tallman, J., dissenting) (arguing that the majority's decision was inconsistent with *Saravia* and *Armendariz*).

Thus, it remains unclear what form of reliance the Ninth Circuit requires to establish retroactive effect in the immigration context. No subsequent Ninth Circuit decision has recognized and attempted to resolve the tension between its competing tests for retroactivity.

II. The Circuit Conflict at Issue Merits Resolution by this Court, and this Case Provides an Appropriate Vehicle for Resolving It.

The question at issue in this case is ripe for resolution by this Court at this time and in this case, as it clearly presents for resolution an extremely important issue that has deeply divided the circuits.

A. The Conflict Is Important.

The conflict at issue in these cases is important because it affects potentially thousands of non-citizens, and will continue to arise in cases for years to come.

First, applications for relief under Section 212(c) will remain common in removal proceedings, notwithstanding the passage of time since the repeal of that form of relief in 1996. The sheer number of relevant circuit court decisions that continue to arise is itself evidence that the issue will continue to recur for years to come. Moreover, those cases represent only a small fraction of the cases arising before the immigration courts. Statistics compiled by the Executive Office of Immigration Review indicate that thousands of equitable relief applications continue to be filed by lawful permanent residents every year, and that over 1,000 applications for Section 212(c) relief were granted in fiscal year 2008 alone (approximately 25% of all those applications). Moreover, the number of such applications has not substantially decreased over the last five years. *See*

generally Brief of Amici Curiae Immigration Defense Project, Immigrant Legal Resource Center, National Immigration Project of the National Lawyers' Guild, and National Association of Criminal Defense Lawyers in Support of Petitioner (hereinafter "IDP Amicus Brief") at 15, *Ferguson v. Holder*, No. 09-263 (Sept. 30, 2009); *see also* Executive Office for Immigration Review, U.S. Dep't of Justice, FY 2008 Statistical Year Book R3 (2009), http://www.justice.gov/eoir/statspub/fy08syb.pdf.

The significant volume of cases involving Section 212(c) relief will likely continue for years to come, for several reasons.

As an initial matter, many non-citizens, particularly those who have rehabilitated themselves after old convictions, do not encounter law enforcement agents except when they travel abroad. As a result, such non-citizens may go for years without incident, but then will be placed in removal proceedings at some point in the distant future when they travel, unaware that their old conviction has any continuing consequence.

Mr. Molina's case presents a prime example of this phenomenon. He was never arrested, let alone convicted, in the years after his conviction in 1990. Pet'r-Appellant's Opening Br. C.A.9, No. 04-71033, at 9. Therefore, the government made no effort to place him in removal proceedings until he traveled abroad over a decade after the conviction. *See also Perriello v. Napolitano*, 579 F.3d 135, 137 (2d Cir. 2009) (non-citizen placed into removal proceedings following "brief trip to Italy" based on 16-year old conviction obtained by trial).

In addition, new enforcement practices put in place by immigration authorities will likely bring more non-citizens with old convictions to the attention of the federal government. The government has recently taken steps to increase its enforcement activities against people who are not convicted of recent crimes. For example, the government has begun to arrest large numbers of people at worksites; to run criminal history checks on people applying for adjustment of status, green card renewal, and naturalization; and to check the immigration status of people brought to county jails prior to any determination as to whether or not to pursue criminal charges against them. *See* IDP Amicus Brief at 8-12. These practices have already resulted in removal proceedings against people with very old convictions obtained by trial. *See, e.g., id.* at 12-13 (describing how removal proceedings were initiated against woman arrested at worksite raid based on twelve year-old conviction); *Hernandez de Anderson*, 497 F.3d at 931 (removal proceedings initiated against woman with nineteen year-old conviction on the same day that her application for naturalization was denied).

For all of these reasons, the government's immigration enforcement practices will likely ensure that people with decades-old convictions will continue to encounter federal agents for years to come. Thus, the government's assertion in past cases that the conflict at issue here "has diminishing prospective significance because it affects only removal proceedings for aliens convicted at trials before IIRIRA was enacted in 1996" is incorrect. Brief in Opposition to *Certiorari* at 13, *Zamora v. Mukasey*, 128 S.Ct. 2051 (2008) (No. 07-820). In fact, people

with such convictions are likely to continue to be placed in removal proceedings for the foreseeable future.

Second, the conflict at issue is significant because the interests at stake are unusually important. This Court has long held that, although deportation is not punishment, it nonetheless constitutes a significant sanction that "may result also in loss of both property and life, or of all that makes life worth living." *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922). In the subset of cases involving people convicted of removable crimes prior to 1996, the interests at stake are in general even greater than in most other cases involving applications for relief from removal, because the people involved necessarily have lived in this country for decades, generally have not been convicted of any crimes for many years, and usually have developed extensive ties to this country during that time.

Again, Mr. Molina's case presents a prime example of the importance of the issue. The record before the Immigration Judge reflects that he has lived here for more than thirty years, twenty-nine of which as a lawful permanent resident, that he has not been arrested or convicted for any crime in the last nineteen years, and that during that time he has provided strong support to his family. Everyone in his family – his wife, three children, and grandchildren – is a U.S. citizen, and their lives will be profoundly affected by losing their father or grandfather to the permanent mandatory deportation that retroactive application of IIRIRA entails.

Third, resolution of this case is important because confusion over the proper test for

retroactivity and the role of reliance in it extends beyond the context here. The issue also arises with respect to other rules enacted by IIRIRA. For example, the same conflict has already begun to arise in cases applying 8 U.S.C. 1101(a)(13), which altered the rules governing returning lawful permanent residents based on their criminal history. *Compare Olatunji v. Ashcroft*, 387 F.3d 383, 389 (2004) (holding that IIRIRA's rule does not apply retroactively whether or not the non-citizen can show reliance on pre-existing law) *with Camins v. Gonzales*, 500 F.3d 872, 884 (9th Cir. 2007) (holding that the IIRIRA rule does not apply retroactively to those lawful permanent residents convicted by guilty plea prior to IIRIRA's enactment because they pled guilty in reliance on pre-existing law).[13] Similarly, conflict is likely to arise with respect to IIRIRA's rules governing eligibility for cancellation of removal, which may be triggered by pre-enactment convictions. *See Sinotes-Cruz v. Gonzales*, 468 F.3d 1190, 1202-03 (9th Cir. 2006) (holding that IIRIRA's "stop-time rule" in 8 U.S.C. 1229b(d) does not apply retroactively to people who pled guilty before the statute's enactment).

Moreover, the confusion over the nature of the retroactivity analysis at issue in this case is not

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[13] Because Mr. Molina was charged under IIRIRA's rule governing the treatment of returning lawful permanent residents, his case affords an opportunity for resolution of this question as well. The Ninth Circuit rejected his retroactivity claim on this issue for the same reason that it rejected his claim concerning IIRIRA § 304(b). *See* Pet. App. 3a-5a (rejecting his retroactivity claim concerning Section 1101(a)(13)).

limited to IIRIRA. *See, e.g., Kankamalage v. INS*, 335 F.3d 858 (9th Cir. 2003) (relying on *St. Cyr* to hold that 1990 regulation barring asylum to those convicted of "particularly serious crimes" does not apply retroactively to people who pled guilty prior to regulation's promulgation); *Thaqi v. Jenifer*, 377 F.3d 500, 504 (6th Cir. 2004) (holding that AEDPA § 440(d) does not apply retroactively to people convicted occurring by guilty plea, but suggesting that it might apply to those convicted by trial); *Perriello v. Napolitano*, 579 F.3d 135, 143 n.11 (2d Cir. 2009) (holding that IMMACT's limitation on Section 212(c) relief for people serving more than five years' imprisonment applies retroactively to people convicted by trial prior to statute's enactment, but reserving the question whether it applies to people convicted by plea).

These cases make clear that the question presented here concerning the role of reliance in retroactivity analysis is of wide-ranging and enduring importance beyond the Section 212(c) context, and that the issue will continue to arise for years to come absent this Court's intervention.

B. This Case Properly Presents the Question for Decision.

Unlike prior petitions this Court has denied, this case presents an appropriate vehicle for resolving the conflict identified here.

First, early petitions were filed prior to the existence of a true circuit conflict.[14] The first actual circuit conflict arose only in 2004, when the Second Circuit held that at least some people convicted by trial could prevail on a subjective reliance theory and the Third Circuit held that non-citizens who chose to go to trial in reliance on then-existing law could show retroactive effect. *See Restrepo v. McElroy*, 369 F.3d 627, 631-40 (2d Cir. 2004); *Ponnapula v. Ashcroft*, 373 F.3d 480 (3d Cir. 2004). The conflict became acute only in 2007, after the Tenth Circuit adopted its objective reliance standard, the Third Circuit held that *St. Cyr* applies in all cases involving pre-1996 convictions, and the Fifth Circuit adopted the Second Circuit's subjective reliance standard. *Hem*, 458 F.3d at 1197; *Atkinson*, 479 F.3d at 230; *Carranza-de Salinas*, 477 F.3d at 208.

Second, the government has previously opposed certiorari because not all the circuits had considered the regulations governing retroactive application of IIRIRA § 304(b), which were promulgated in 2004. But more than five years after the agency promulgated the regulations, the circuit conflict shows no signs of abating.[15]

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[14] *See, e.g., Lawrence v. Ashcroft*, 540 U.S. 910 (2003); *Dias v. INS*, 539 U.S. 926 (2003); *Armendariz-Montoya v. Sonchik*, 539 U.S. 902 (2003).

[15] The regulations provide that non-citizens convicted by trial prior to IIRIRA's enactment may not apply for relief under Section 212(c). 8 C.F.R. 1212.3(h). The government suggested that some courts could change their positions based on these regulations. *See, e.g.*, Brief for Respondent in Opposition at 14-15, *Rodriguez-Zapata v. Gonzales*, 127 S.Ct. 2934 (2007) (No.

Third, other petitions were plagued by vehicle problems. In some, there were questions whether the petitioner was eligible for Section 212(c) relief at all.[16] In others, the question was not squarely presented or the focus of the petition.[17]

In contrast, this case squarely presents the question whether defendants convicted by trial of a removable offense prior to the repeal of Section 212(c) are eligible for relief. Petitioner unquestionably raised the issue before the immigration courts and the Ninth Circuit, and lost before both the agency and the Ninth Circuit on that basis. Pet. App. 16a-18a, 9a, 5a-6a. Moreover, there should be no dispute that Petitioner is eligible for relief. Indeed, he is a

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06-929), 2007 WL 1406224; Brief for Respondent in Opposition at 9, *Hernandez-Castillo v. Gonzalez*, 127 S.Ct. 40 (2006) (No. 05-1251), 2006 WL 2136237 (same).

It is unsurprising that the regulations did not ameliorate the split given *St. Cyr*'s conclusion that courts owe no *Chevron* deference to an agency's conclusion on retroactivity questions. *St. Cyr*, 533 U.S. at 320 n.45.

[16] *See, e.g., Cruz-Garcia v. Mukasey*, 285 F. App'x 446 (9th Cir. 2008), *cert. denied, Cruz-Garcia v. Holder*, 129 S.Ct. 2424 (2009); *Zamora v. Gonzales*, 240 F. App'x 150 (7th Cir. 2007), *cert. denied sub nom., Zamora v. Mukasey*, 128 S.Ct. 2051 (2008).

[17] *See, e.g., Saravia-Paguada v. Gonzalez*, 488 F.3d 1122 (9th Cir. 2007), *cert. denied sub nom., Saravia-Paguada v. Mukasey*, 128 S.Ct. 2499 (2008); Brief for the Respondent in Opposition at 6, *Saravia-Paguada v. Mukasey*, 128 S.Ct. 2499 (2008) (No. 07-866), 2008 WL 623189; Brief for the Respondent in Opposition at 12-15, *Morgorichev v. Holder*, 129 S. Ct. 2424 (2009) (No. 08-771), 2009 WL 1061256 (noting numerous other issues raised by petition).

strong candidate, having served his sentence for a single crime committed nearly 20 years ago, with no subsequent arrests or convictions. Since that time, he has been a productive member of society and has provided crucial support for his wife, children, and grandchildren, all of whom are U.S. citizens.

III. The Ninth Circuit's Decision Is Wrong.

This Court should also grant this petition because the Ninth Circuit's decision, like the decisions of several other circuits on this issue, is incorrect.

First, contrary to the Ninth Circuit's caselaw, this Court has never held that reliance on pre-existing law is required for a successful claim establishing retroactive effect. Rather, the inquiry into whether retroactive application of a statute produces a disfavored retroactive effect requires a "commonsense, functional judgment about whether the new provision attaches new legal consequences to events completed before its enactment." *St. Cyr*, 533 U.S. at 321 (quoting *Martin v. Hadix*, 527 U.S. 343, 357-358 (1999)). While a showing of reliance can undoubtedly be one way of establishing a "new legal consequence," nothing in this Court's articulation of the test for retroactivity affords it dispositive weight.

In *St. Cyr* itself, this Court never stated that reliance should be treated as dispositive. On the contrary, the Court cited its pre-existing retroactivity law, and ultimately concluded simply that retroactive application of Section 304(b) "attaches a new disability, in respect to transactions or considerations already past." *St. Cyr.*, 533 U.S. at 321 (quoting *Landgraf*, 511 U.S. at 269). Indeed, as noted above,

in several of this Court's cases concerning retroactivity, the prevailing party could not have shown any kind of reliance interest. *See supra* p. 15. *See generally* Nancy Morawetz, *Determining the Retroactive Effect of Laws Altering the Consequences of Criminal Convictions*, 30 FORDHAM URB. L.J. 1743 (2003) (reviewing Supreme Court's retroactivity jurisprudence and concluding that reliance cannot be a prerequisite for finding retroactive effect when determining the immigration consequences of a criminal conviction).

Application of this Court's *Landgraf* retroactivity test makes clear that IIRIRA attached a "new legal consequence[]" to Mr. Molina's pre-enactment conviction, because the legal effect of the conviction is "certain deportation" under the new legal regime. In contrast, at the time he decided to go to trial, Mr. Molina faced only two far less serious immigration consequences: possible exclusion from the United States, with the right to apply for discretionary relief from exclusion, and a five-year delay in applying for naturalization. *See supra* pp. 5-6. The massive new penalty associated with his conviction is a "new legal consequence" attached to an "event[] completed before [IIRIRA's] enactment," and therefore triggers the presumption against retroactivity. *St. Cyr*, 533 U.S. at 321.

Second, even if reliance were a necessary part of any retroactivity analysis in this context, the Ninth Circuit's decision is incorrect because, like the First and Seventh Circuits, the Ninth Circuit erroneously assumed that the decision to go to trial is *never* made in reliance on the immigration consequences of the conviction at the time that decision is made. As this

Court stated in *St. Cyr*, however, many non-citizens charged with crimes consider the immigration consequences in making the decision whether or not to go to trial. *Id.* at 322 (non-citizens generally "factor the immigration consequences of conviction in deciding whether to plead *or* proceed to trial." 533 U.S. at 322 (emphasis added); *see also id.* at 325 (holding that application of IIRIRA rule would have retroactive effect on St. Cyr's decision "whether to forgo [his] right to a trial."). Nothing in the Court's language nor its logic suggests that this fact changes based on which option the defendant ultimately chooses. *See also Ponnapula v. Ashcroft*, 373 F.3d 480, 494 (3d Cir. 2004) (holding that non-citizen who chose to go to trial in reliance on immigration consequences of conviction at that time could show retroactive effect).

St. Cyr's language on this point reflects the reality that the decision at issue in this case – whether or not to go to trial – is *the same decision* as the one at issue in *St. Cyr*. Therefore the rationale of *St. Cyr* – that defendants generally would consider the immigration consequences in making that decision – applies equally to cases involving defendants convicted by trial.

Mr. Molina's case presents a prime example of why *St. Cyr*'s rationale applies in the trial context. Any reasonable non-citizen would have considered the fairly minor immigration consequences he faced in determining whether to plead guilty or go to trial. Had such a person been told instead that a loss at trial would result in permanent mandatory deportation, that information would obviously have altered the calculus in dramatic fashion, and would

likely have given rise to vigorous efforts to secure a plea bargain that avoided those consequences. Thus, as Mr. Molina's case makes clear, a non-citizen who elects to proceed by trial and ultimately loses may have weighed the immigration consequences of conviction just as much as a non-citizen convicted by plea bargain.[18]

Third, the approaches of the majority of the Circuits ignore the fact that retroactivity analysis is ultimately a matter of statutory interpretation.[19] The statutes at issue here – both Section 212(c) itself and its repealing provision at IIRIRA § 304(b) – do not distinguish between people convicted by guilty plea and by trial, or between people who engaged in post-conviction conduct in reliance on the availability of discretionary relief and those who did not engage in such conduct. Similarly, this Court's retroactivity decisions have always focused on the class of people affected by the applicable statute, rather than on particular individuals. As Judge Becker stated in concluding that a non-citizen convicted by trial could show retroactive effect without demonstrating individualized reliance, "[t]he likelihood that the

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[18] Mr. Molina was not afforded an opportunity to make a record on this point, because the Immigration Judge found him categorically ineligible for 212(c) relief because his conviction was obtained by trial. Pet. App. 17a-18a. Nonetheless, his attorney proffered that Mr. Molina had relied on the availability of 212(c) relief when he chose to go to trial. Pet. App. 17a (noting counsel's argument on this point).

[19] The approaches taken in the Third, Eighth, and Tenth Circuits, as well as Judge Luttig's approach for the Fourth Circuit in *Olatunji*, do not suffer from this defect.

party before the court did or did not in fact rely on the prior state of the law is not germane to the question of retroactivity." *Ponnapula*, 373 F.3d at 493 (noting that Supreme Court retroactivity cases had not treated subjective reliance as relevant to retroactivity inquiry).

CONCLUSION

For the foregoing reasons, the Court should grant this petition for a writ of certiorari. If this Court grants certiorari in *Ferguson v. U.S. Atty. Gen.*, No. 09-263, the two cases should be heard together because they raise the same issues. Alternatively, this Petition should be held in abeyance pending resolution of the merits in *Ferguson*.

Respectfully submitted,

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October 29, 2009

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

VICTOR WILLIAM MOLINA-DE LA VILLA

Petitioner,

v.

ERIC H. HOLDER, Jr., Attorney General,

Respondent.

Nos. 04-71033 and 05-74126

Agency No. A020-065-527

ORDER

Before: NOONAN and SILVERMAN, Circuit Judges, and CONLON,* District Judge.

The full court has been advised of the Petition for Rehearing En Banc and no judge of the court has requested a vote on the Petition for Rehearing En Banc. Fed. R. App.P.35. Petitioner's Petition for Rehearing En Banc is DENIED.

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* The Honorable Suzanne B. Conlon, United States District Judge for the Northern District of Illinois, sitting by designation.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

VICTOR WILLIAM MOLINA-
DE LA VILLA

Petitioner,

No. 04-71033
Agency No. A020-065-527

v.

MEMORANDUM*

MICHAEL B. MUKASEY,
Attorney General,

Respondent.

VICTOR WILLIAM MOLINA-
DE LA VILLA

Petitioner,

No. 05-74126
Agency No. A020-065-527

MICHAEL B. MUKASEY,
Attorney General,

Respondent.

On Petition for Review of an Order of the
Board of Immigration Appeals

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*This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Argued and Submitted December 9, 2008
Pasadena, California

Before: NOONAN and SILVERMAN, Circuit Judges, and CONLON,** District Judge.

Victor William Molina de la Villa ("Molina") seeks review of an order of removal issued by the Board of Immigration Appeals ("BIA") on February 18, 2004. The BIA determined that Molina was inadmissible as an arriving alien who had been convicted of a crime involving moral turpitude. *See* 8 U.S.C. § 1182(a)(2)(A)(i) (2008); 8 U.S.C.§ 1101(a)(13)(C)(v) (2006). We have jurisdiction under the Immigration and Nationality Act ("INA") § 242, 8 U.S.C. § 1252; *see, e.g., Camins v. Gonzales,* 500 F.3d 872, 876 (9th Cir. 2007) (exercising jurisdiction under 8 U.S.C. § 1252(a)(2)(D)). For the reasons stated below, we deny the petition for review.

This court has found that 8 U.S.C. § 1101(a)(13)(C)(v) may reasonably be applied retroactively. *See id.* at 880. Molina argues that 8 U.S.C. § 1101(a)(13)(C)(v) has an impermissible retroactive effect in his case under *Landgraf v. USI Film Products,* 511 U.S. 244 (1994) because at the time of his conviction Molina's crime would not have rendered him inadmissible after a short trip abroad. Under *Landgraf,* this court employs a two step analysis. *See Hernandez de Anderson v. Gonzales,*

497 F.3d 927, 935-36 (9th Cir. 2006). First, the court determines whether "Congress has expressly prescribed the statute's proper reach." *Landgraf*, 511 U.S. at 280. If not, the court must then examine the statute to determine if its application impermissibly "impose[s] some burden on the basis of an act or event preceding the statute's enactment." *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 37 (2006). The attachment of new legal consequences to past actions is impermissible when it conflicts with "familiar considerations of fair notice, reasonable reliance, and settled expectations." *Landgraf*, 511 U.S. at 270.

In *Camins*, this court found that Congress did not clearly indicate its intent to apply 8 U.S.C. § 1101(a)(13)(C)(v) to prior conduct. *Camins*, 500 F.3d at 882. *Camins* also found that the retroactive application of 8 U.S.C. § 1101 (a)(13)(C)(v) undoubtedly attached new legal consequences to past actions. *Id.* The question before us, then, is whether in Molina's case the retroactive application of 8 U.S.C. § 1101(a)(13)(C)(v) conflicts with any reasonable reliance interest Molina may have had in the state of the law at the time of his conviction.

** The Honorable Suzanne B. Conlon, United States District Judge for the Northern District of Illinois, sitting by designation.

To determine whether there is a conflict with a protected reliance interest, "we require that reliance on the prior law 'would have been objectively reasonable under the party's circumstances.'" *Id.* at 884 (citing *Hernandez*, 497 F.3d at 941). Following the Supreme Court's holding in *I.N.S v. St. Cyr*, 553 U.S. 289 (2001), we have generally found objectively reasonable reliance when a party pled guilty to a crime as part of a *quid pro quo* agreement with the government. *See Saravia-Paguada v. Gonzales*, 488 F.3d 1122, 1130-31 99th Cir. 2007). Outside of the context of a guilty plea, we have also found reasonable reliance where a party acted affirmatively to apply for naturalization under the assumption that suspension from deportation would be available. *See Hernandez*, 497 F.3d at 942-43.

However, we require that "an alien must demonstrate some affirmative reliance on a previously available immigration benefit to show impermissible retroactivity." *Saravia-Paguada* 488 F.3d at 1134. By simply going to trial, Molina showed no affirmative reliance on the state of the law at the time. Nor do any of Molina's subsequent actions indicate the kind of affirmative post-conviction reliance we found in *Hernandez*.

Molina also contends that the Illegal Immigration Reform and Immigration Responsibility Act section 304(b)'s elimination of the former INA section 212(c) waiver from excludability was

impermissibly retroactive in his case. His argument fails here for the same reason as above. In both *St. Cyr* and *Hernandez*, the petitioners relied directly on the existence of relief from deportation in making their decisions to plead guilty or to apply for naturalization respectively. Molina did not rely upon the existence of the 212(c) waiver, but rather passively relied upon the fact that conviction for his crime did not result in deportation at the time. Because he took no affirmative action that "enhanced [the] significance [of section 212(c)] to him in particular," he cannot claim to have reasonably relied on it. *See Saravia-Paguada*, 488 F.3d at 1134 (citing *Fernandez-Vargas*, 548 U.S. at 44 n.10).

Molina's final argument is that the elimination of section 212(c) relief violates his Equal Protection rights because the law denies non-citizens who went to trial the opportunity to apply for section 212 (c) relief—even though there were no immigration consequences to their conviction at the time they chose to go to trial—while allowing non-citizens who pled guilty to the same offenses at the same time to apply for section 212(c) relief. However, as this court has recently stated, "Congress has particularly broad and sweeping powers when it comes to immigration. . . Our task, therefore, is to determine, not whether the statutory scheme makes sense to us, but whether we can conceive of a rational reason Congress may have had in adopting

it." *Abebe v. Mukasey*, 548 F.3d 787, 790 (9th Cir. 2008) (en banc). A legislative classification must be "wholly irrational" to violate Equal Protection. *Mathews v. Diaz*, 426 U.S. 67, 83 (1976).

That is not the case here. Congress could rationally have concluded that it would be unfair to eliminate a particular form of relief from removal for aliens who could demonstrate an objective measure of past reliance—such as a guilty plea—on the previously available relief. Congress might also rationally conclude that honoring such past reliance could encourage future plea bargain agreements. Either way, Congress's distinction was not sufficiently irrational to violate Equal Protection in this case.

PETITION FOR REVIEW DENIED.

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5201 Leesburg Pike, Suite 1300
Falls Church, Virginia 22041

MOLINA, DE LA VILLA,
VICTOR WILLIAM
C/O 3300 E. STEWART AVE.
LAS VEGAS, NV 89101-0000

U.S. INS/SPD
606 S. Olive Street,
8th Floor
Los Angeles, CA
90014

Name: MOLINA DE LA VILLA, VICTOR WILLIAM A20-065-527

Date of this notice:
02/18/2004

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

[signature]

Frank Krider
Acting Chief Clerk

Enclosure

Panel Members:
OSUNA, JUAN P.

U.S. Department of Justice
Decision of the Board Executive Office for
Immigration Review of Immigration Appeals
Falls Church, Virginia 22041

File: A20-065-527 – SAN PEDRO Date: FEB 18 2004

In re: MOLINA DE LA VILLA, VICTOR WILLIAM

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

ORDER:

PER CURIAM. We adopt and affirm the decision of the Immigration Judge dated September 11, 2003. *See Matter of Barbano*, 20 I&N Dec. 872, 874 (BIA 1994) (noting that adoption of affirmance of a decision of an Immigration Judge, in whole or in part, is "simply a statement the Board's conclusions upon review of the record coincide with those the Immigration Judge articulated in his or her decision"). We have reviewed the respondent's recently filed brief. The Immigration Judge issued a comprehensive decision which disposes of all issues in this matter and we are in agreement with her decision. The respondent is not eligible for a waiver of inadmissibility under section 212(c) because he did

not plead guilty. See Armendariz-Montoya v. Sonchik, 291 F.3d 1116, 1121 (9th Cir.2002) ("aliens who elected a jury trial cannot plausibly claim that they would have acted any differently if they had known about §440(d)"). The respondent cannot claim to be a national of the United States because he claims to have filed a naturalization application. We recently held in Matter of Navas-Acostas, 23 I&N Dec. 586 (BIA 2003), that nationality under the Immigration and Nationality Act may be acquired only through birth or naturalization. See also Perdomo-Padilla v. Ashcroft, 333 F.3d 964, 969 (9th Cir. 2003) ("one may become a 'national of the United States' only through birth or by completing the process of becoming a naturalized citizen)." We also agree with the Immigration Judge's analysis that the respondent did not establish eligibility for asylum, withholding of removal, cancellation of removal, or protection under the Convention Against Torture for the reasons contained in her decision. Accordingly, the appeal is dismissed.

[signature Juan P. Osuna]
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
San Pedro, California

File No.: A 20 065 527 September 11, 2003

In the Matter of

VICTOR WILLIAM MOLINA DE LA VILLA — IN REMOVAL PROCEEDINGS

Respondent

CHARGE: A crime involving moral turpitude.

APPLICATIONS: Cancellation of removal, deferral of removal under the Convention against Torture, 212(c).

ON BEHALF OF RESPONDENT:	ON BEHALF OF DHS:
Allison Wannamaker	Richard Vinet
Attorney-at-Law	Assistant District Counsel

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 51-year-old married male, native, and citizen of Colombia who arrived in the United States on a trip back from Colombia and was

placed in removal proceedings by issuance of a Notice to Appear dated December 2, 2002. The respondent was charged with being removable from the United States because he was convicted on February 2, 1990, in the California Superior Court, Los Angeles County for the offense of assault to commit mayhem and rape for which the Government alleges he is removable because it is a crime involving moral turpitude. The respondent was initially heard in Houston, Texas and the case was subsequently transferred to San Pedro where the respondent is in custody of the Government. The Judge in Houston marked into the record as Exhibit 2 the I-213 in a question and answer from the respondent dated December 2, 2002, in which he states that he was returning from a visit to Colombia and that he has been a permanent resident since January 23, 1980, then he was questioned about his criminal record. There is also a computer printout several pages long relating to encounters with the police. There is also a copy of the California Penal Code relating to the charge against the respondent's criminal charges. The Court received this file from Houston without an apparent Exhibit 3. Exhibit 4 is the cancellation of removal application with the respondent's earnings from '74 through '2000 and copies of the California driver's license for a social security card in the name of Zorida Molina, social security cards in the name of Victor Andolina, Jr., Victor William Molina, Maritza Molina, and a copy of the respondent's passport, and the respondent was previous addresses and his role in the United States. Exhibit 5 which was also marked in

Houston looks like it is a law enforcement printout regarding the respondent's run-ins with the law. There is also a probation officer's report relating to respondent's conviction. The respondent was found guilty by a jury verdict of the offense of assault with intent to commit rape in violation of Section 220 of the California Penal Code, this occurred February 2, 1990, in the Los Angeles County Superior Court. He was also found guilty of simple assault by the jury and he filed an appeal from that decision April 18, 1990. Also part of Exhibit 5 is the Order on Appeal of the respondent's conviction that decision was rendered in March of 1992, and the decision was affirmed in full. This appeal decision also reflects that the respondent was convicted following a jury trial for assault with intent to commit rape and that he was sentenced to the upper term of six years which was suspended and provided he served 365 days in the county jail, and the Court of Appeals affirmed the decision in full. The respondent had appealed the fact that the upper term of six years had been selected, but the Appeals Court disagreed with that. There was also an abstract report indeterminate sentence which reflects the respondent was convicted of assault with intent to commit rape by a jury trial. There is also the felony complaint and sentencing documents which reflect that. On April 18, 1990, respondent was sentenced to six years in the state prison that sentence was suspended provided he served 365 days in the county jail, and he was required to register as a sexual offender. Exhibit 6 is a letter that the respondent wrote to the

judge in Houston requesting a change of venue. Exhibit 8 is the Government's brief regarding whether or not respondent's crime can be waived by a 212(c) waiver. Exhibit 9 is the Government's brief regarding respondent's eligibility for withholding of removal arguing that the respondent does not qualify for withholding of removal, but that he does qualify to apply for deferral of removal against, under the Convention against Torture. Exhibit 10 is a printout from Wells Fargo Bank dated December 31, 2002, and a Motion to Withdraw as Counsel. Exhibit 11 is another motion requesting change of venue. I received this file from Houston without an appearance Exhibit 12. Exhibit 13 is the Government's opposition to the Motion to Change Venue. Exhibit 14 is a letter from the respondent discussing what he is willing to do to have this case sent to California. Exhibit 15 is a computer printout for a naturalization application from 1998 which shows that it was denied and closed. There is another one in 2000 that shows it was lack of prosecution. It was eventually closed. Exhibit 16 is the respondent's passport which shows temporary evidence of his permanent resident status in 1980, and it shows in 1998 he had a pending N-400. Exhibit 17 is the Form I-589 with supplement to Part A-3 in the declaration of the respondent. Exhibit 18 is the letter forwarding the application to the State Department for an Advisory Opinion. Exhibit 19 is the State Department's response consisting of a sticker stating that they had no comment on the respondent's application and referring the Court to the Country Report on Human Rights Practices.

Exhibit 20 are background documents submitted in support of the application for deferral of removal under the Convention against Torture, it relates to country conditions in Colombia. Exhibit 21 are further documents in support of the application which are documents regarding respondent's particular case, letters from his brother and his sister, and a friend, his registration with the Chamber of Commerce as a merchant in Colombia, and a certificate from the Chamber of Commerce showing his brother is the owner of the business in Colombia. 22 is the I-191 that was filed, additional responses, another copy of the Wells Fargo Bank statement dated November 12, 2002, another copy of the FICA earnings from 1974 to 2000. Southern California Edison bills another declaration of the respondent, and a fee waiver request, and letters from the respondent, his wife, his daughter, son, and daughter, another one from his wife, another one from his daughter, another one from both daughters, a letter from Karen Fisher First Christian Church, Sherry Hill Vastard's educational consultant letter dated April 21, 2003, a letter from Jessica Lugo. These are all in the record as adjoining Exhibit 22, they were marked for identification purposes only since the respondent is not eligible for the 212(c) waiver. Exhibit 23 is copies of respondent's resident alien card, his social security card, a maxi-card, California identity card, another California identity card, Long Beach container dermoidal document, business card for Kevin Coacher, an Arizona commercial driver's license in the name of the respondent, and a frequent fueller road link card,

birth certificate for Victor Molina, Jr., birth certificate in Spanish relating to the respondent, birth certificate of one of the respondent's daughters who was born in Newark, New Jersey, marriage certificate for the respondent and his wife, a copy of his wife's U.S. passport and driver's license, those are all in the record as a joint Exhibit 23. Exhibit 24 is a copy of the airline ticket that the respondent presented when he arrived in Houston, Texas on December 2, 2002. It also has the itinerary and the boarding pass and the folder in which the tickets were being held by the respondent and his baggage check. Exhibit 25 is counsel's motion to withdraw the deferral of removal application and proceed only on an appeal on the issue of respondent's eligibility for 212(c) waiver, and exhibit 26 for identification purposes only are letters that the respondent has mailed to the Court notwithstanding his attorney's advice to the contrary. Counsel was shown the letters during the hearing and she indicated that she did not wish to provide them to the Court, but the respondent insisted so they have been marked into the record for identification purposes only as Exhibit 26.

Turning first to the issue of 212(c), the respondent wishes to apply for 212(c) for the conviction that he had for assault with intent to commit rape on February 2, 1990. The respondent argues that he should be eligible for 212(c) even though he did not plead guilty to 212(c) because at the time of his conviction 212(c) was available, and that there is a District Court case in Massachusetts

that remanded a case for a 212(c) hearing when the person did not plead guilty. The Government argues that the respondent is ineligible for a 212(c) waiver because that is exactly the issue that was presented before the Supreme Court in the St. Cyr case. The reason that, that case was found to be eligible for 212(c) was because when he entered a plea of guilty he relied upon the availability rather of a 212(c) waiver. In addition, the regulations 8 C.F.R. Section 212.14(d) require the guilty plea as a precondition to eligibility for a 212(c) which has since been repealed. The 9th Circuit held in Armendariz that a guilty plea is also required, and that is the only way that 212(c) can be revitalized for someone at this time. The Government also pointed to another decision Toia that requires a guilty plea, that the Court is bound by these published decisions as well as by the implementing regulations and that the Court is not in a position to consider 212(c) in this case because case law and the regulations require that respondent be found ineligible for a 212(c) waiver since he was convicted by a jury verdict.

The Court is bound by the published decisions of the Ninth Circuit in the U.S. Supreme Court and by the regulations. The Court is not in a position to find that there should be an exception made in this case or in any case. The higher courts have ruled and the regulations state that in order to qualify for the Nalabalus 212(c) waiver the person must have entered a plea of guilty. Since the respondent did not do this in this case he is not eligible for a 212(c) waiver. I understand

counsel's argument that he was eligible at that time so he relied upon the fact that he was eligible at the time and did not have to worry about whether or not he pleaded or not, the fact remains that the courts have made a distinction between people who have pleaded guilty and who have been convicted by jury verdict, and only those who pleaded guilty have been found eligible for a 212(c) waiver. Accordingly, for the reasons I have stated I cannot consider the respondent eligible for 212(c) his application is denied.

The respondent also filed an application for cancellation of removal. He does not qualify for cancellation of removal because his conviction is an aggravated felony. Aggravated felonies are not waivable by a cancellation of removal. Accordingly, the respondent is statutorily barred from eligibility for cancellation of removal and that application is likewise denied.

The respondent filed a Form I-589. That application is one for asylum, withholding of removal under 241B and withholding and deferral of removal under the Convention against Torture. The respondent is not eligible for asylum or withholding of removal because his conviction makes him statutorily ineligible for both forms of relief. The respondent has been convicted of an aggravated felony which makes him ineligible by statute for asylum. Because he received a six year suspended sentence for the aggravated felony conviction he is also statutorily precluded from eligibility for withholding of removal under 241(b) or under the Convention against Torture. Accordingly, his

application has not been considered one for either asylum or withholding of removal.

The remaining application to be considered is deferral of removal under the Convention against Torture. The respondent presented his own testimony. He stated that he was born in Cali, Colombia, that he has been a lawful permanent resident since 1980, based upon his marriage to a United States citizen. The respondent testified that he does have one brother and two sisters in Colombia and he has two brothers in the United States who are both lawful permanent residents. He has three United States citizen children who are ages 21, 23, and 16 years old. The respondent testified that his parents are in Colombia and that he has never been previously deported from the United States. He testified that he went to Bogota on November 20, 2002, to visit his parents and because he has a business with his brother consisting of natural gas installation. He left early because of problems with the paramilitary on December 2, 2002. He said he has previously gone to Bogota in December of '98, March of 2002, and then this last time in November of 2002. Before we get to the issue of deferral of removal under the Convention against Torture, the respondent also raised the issue of his eligibility for citizenship because he had previously filed applications for naturalization which never resulted in him being naturalized. The respondent was hoping that he would be able to be derive some benefit by the fact that he got close to completing the process of naturalization but never, in fact,

completed the process. The respondent cannot be considered a national of the United States simply by having filed the applications for naturalization because national can only be acquired through birth or naturalization. See Perdomo Kadia v. Ashcroft, cited by the Ninth Circuit June 23, 2003, case no. 01-71454; See also In re Navas-Acosta, Int. Dec. 3489 23 I&N Dec. 586 (BIA 2003), in which the Board held that nationality cannot be acquired by taking an oath of allegiance pursuant to an application for naturalization because birth and naturalization are the only means of acquiring U.S. nationality under the Immigration and Nationality Act. Since the respondent never became naturalized, the fact that he applied for naturalization does not render him a national of the United States. The respondent was not born in the United States so he has no claim to being a national of the United States. He, therefore, remains an alien and subject to removal.

Regarding the deferral of removal application, the respondent testified that he went to Cali, Colombia on November 20, 2002, and attempted to re-enter the United States on December 2, 2002. That he returned to the United States because he had a confrontation with individuals which frightened him so much he decided he needed to return early. His parents, brother, and two sisters still live in Colombia. His two brothers, wife, and three children all live in the United States. His father ran for local public office under the liberal party. The respondent was active with a student organization and labor syndicates. He

participated in 15 demonstrations throughout high school. Once he was shot in his left hand hiding from the military police. Once he was beaten by the local police. He came to the United States in 1971 because he hated his country. In 1971 he came in as a visitor and returned to Colombia at the end of 1973 to get a student visa which he did obtain. He returned to the United States in April of 1974 and lived in Newark, New Jersey. He was married on October 14, 1977, in Newark, New Jersey according to the marriage certificate which is in the record as Exhibit 22. Respondent's brother bought land five or six years ago for agricultural cultivation, but was not successful. Respondent is the commercial business associate for the farm. He provides financial support. He said he opened a bank account in Cali so that his brother could start building the business. Between March and November of 2002, the respondent said he sent between $5,000 and $6,000. Respondent visited the land March of 2002, and then he returned to the United States 10 days later. He went for his father's birthday on March 10th. The neighbors told his brother that the paramilitary had settled in the FARC. The respondent described the paramilitary as right-wing guerrillas who are sponsored by the Government because they both fight the leftist guerrillas. Respondent knows this from watching the news, reading the Department of State reports and from talking to his family. The respondent wanted to make a police report asking for protection and his brother agreed. The respondent and his brother went to the nearest police

station in the area towards Buenaventura. He asked the police to patrol the area more frequently and for protection, and to speak to the paramilitaries to let them know that they had plans to develop the property. The police told the respondent that they should build a brick wall because it looks like an abandoned property. The police said that they would try to patrol the area, but they made no promises. Respondent did not observe the police making any additional patrols. He stayed in Colombia about seven or eight days after filing the report. Many would ask if the respondent was Holber's foreign brother to make trouble for them and if he filed a report with the police. Respondent admitted that he did file the report with the police. He said the man wanted to know why he was getting involved in their operation and respondent said he was only interested in the property. The respondent said he heard loud talking between his brother and another man, but he could not hear what his brother was saying. This occurred in his brother's store and these men were in the store for about 15 minutes total. They said they would wipe them out which respondent understood to mean that they would stab him, shoot him, or make him disappear. Respondent's brother told them to return to California now that they have seen him. He said that these two people belonged to a large gang of criminals and mercenaries. The respondent decided to leave town earlier and not stay for the holidays. After the incident at the store, the respondent stayed in Colombia until December 2, 2002. He is concerned about staying in Colombia because he was planning

to stay for the holidays. He said he always go to Colombia for Christmas and stays for New Years. That he had to keep a low profile. He went to church, visited his family, and tried to return as soon as possible. He arrived in Houston on a connecting flight on December 2, 2002. The immigration told him that he was being detained for a conviction in 1990 for assault with intent to commit rape. The respondent denies physical contact with the victim of the assault. He said he was just trying to start a conversation with her and she ignored him. He kept trying to talk to her and she gave him short answers. He tried to hug her and she ran away, and his hand accidentally got caught in her pants. He has not been arrested for any crime since. If he returns to Colombia now he believes that it will be dangerous for him. He fears for his life and his security, and safety. He cannot go to another part of Colombia because he has no family anywhere but in Cali. The only job that he can do is trucking which is very dangerous in Colombia. He cannot remain an investor in Colombia because there is no place to hide in Colombia. The police will not protect him because the groups there operate with impunity. There is a close relationship with the police and the paramilitaries. In 1982 the respondent went to Colombia for a few weeks when his daughters were infants. After that his wife has not wanted to return to Colombia. His son has never been to Colombia. He knows that his family will not go to Colombia with or without him. The Government Attorney objected to Exhibit 21 because there was no opportunity to cross-examine the witnesses. The attorney notes that none of the

witnesses in Exhibit 21 are in the United States. They are his brother, Holber, his sister Clara, and his friend Francia, and the Government then argued that the weight of the document it should be taken into consideration in determining what weight to accord the documents because Government has not had an opportunity to cross-examine those witnesses.

The respondent testified that he had confrontations with the Colombian government during demonstrations in 1969. He has returned to Colombia many times and he has had no further difficulties arising from those demonstrations in 1969. He said that the land in Baja Colima belongs to his brother. He has had no problems with these people. The respondent does not own the land, but he has invested in the land. His brother has built a fence, cleaned up the property, and made it look occupied which is what the authorities recommended. He was asked if his brother has had any other problems with the paramilitaries and the respondent stated that he did not know. There was nothing in the letter that his brother sent to indicate that he did have further problems with the paramilitaries that letter is dated June 15, 2003. Respondent stated that his brother has not told them that he has had problems with the paramilitaries over this property. He testified that his brother's shop is a two hour drive from the property and that was the only confrontation that he had with the paramilitaries. They were in the store talking with his brother when respondent heard loud talking. His brother told him that they had

asked for him, the respondent and he said that is the only contact in the store that day that the respondent had with the paramilitaries. He does not know their names. He said they identified themselves as being in the paramilitary, but they did not tell the respondent where they were based, that is whether they were based in Cali or Baja Colima. He does not know their names and they are the only two paramilitaries who laid eyes on him. The respondent testified that they were not wearing uniforms. The respondent further testified that Baja Colima is a busy commercial route so leftist and right wing paramilitaries set up roadblocks to control who goes through the highway and to patrol the jungles to capture the rivals. The respondent did not report the confrontation in the shop to the police.

Respondent said he went to Colombia for Christmas and New Years in 1998. When he went to Colombia in March, 2002, he was there for 10 days and when he went in November of 2002, he was there for 10 days. He has been to Colombia less than 30 days in the last five years. His brother had no problems with the paramilitaries on his land in 1998. In March 2002, the respondent visited the brother's land in Colombia. Damage had been done to the fence it was broken down and the door to the house was knocked out. He and his brother discussed what caused the damage. After he returned to the United States he spoke to his family in Colombia. He called his mother on Christmas day and she told him that two individuals had come to the shop looking for the

respondent, and his brother told them that respondent was already gone. His brother told the mother that it was the same two guys who came to the store. The respondent called Colombia again on New Year's Eve and his mother was very worried that if he were deported he would have problems with these people and would face danger. Respondent does not just fear these two guys he fears all of the paramilitary. He spoke to his brother, Holber, last week on a three way with his wife. He stays in touch with his brother, Holber, and his mother. He said the two men who came to the shop were dressed in casual clothes, like anyone on the street, jeans, baseball hats, and jackets. That did not strike him as unusual that they were not wearing a uniform because that way they can go undercover and not identify themselves as being paramilitary. They wanted to know why the respondent had made complaints against them for invading his brother's land and what interest did respondent have in that property. The respondent claims that he was scheduled to return to the United States on January 2 or the first week of January. He had purchased the tickets over the Internet. They handed it to him at the airport when he arrived on November 20th. He said he had asked for the reservation by going to a travel agency to change the reservation in December. The travel agency did not give him any parts or documents. It is possible he received these at the airport in Colombia. The respondent said that he paid for the ticket through a credit card and that was the original price he paid $449. He ordered the

ticket through the Internet in October of 2002. He could not recall the date, but it was about one month before he traveled, close to October 29, 2002. He said the original ticket he obtained showed the itinerary for him to return January, 2003, but he thinks the travel agency in Colombia who changed the ticket for him kept the original. He could not recall the name of the travel agency in Cali that he went to, to change the ticket, he just says it is a very popular one with a German or European name. To get the ticket changed he said you had to pay a $100, but he did not have a receipt for it because he paid the $100 change in ticket fee in cash. He said that the original Internet receipt he does not know where it is any more. The $5,000 that he had in the bank in Colombia in 2002, he never did invest that money in Techno Gas. That his brother actually used $2 to $3,000 of that money. In 1996, respondent said he attended school full time receiving worker's compensation in support of his family with $400 per week for three months and then temporary disability, and then he received less. He said sometimes his wife works and sometimes she receives AFDC when he is disabled and when their income is not enough. The respondent said that he received, a settlement last year on a work injury from an insurance company and that is why he had the money to invest in the business with his brother.

The case was rescheduled for the respondent to present evidence that his ticket had been changed in Colombia as a result of this encounter that he had with the paramilitaries in 2002. The

Government presented the ticket that the respondent used to attempt to re-enter the United States on December 2, 2002, and that ticket is in the record as Exhibit 24. This ticket shows that it was issued on October 29, 2002, which is when the respondent thought that he had obtained his ticket over the Internet to go to Colombia. This ticket that was issued on October 29, 2002, shows the respondent's itinerary as departing Los Angeles November 20, 2002, which the respondent did do, going through Houston, and then arriving in Bogota, Colombia. He was then supposed to return to the United States according to the passenger receipt ticket dated October 29, 2002 on December 2, 2002, again traveling through Houston before arriving in Los Angeles. This ticket shows it was for $449 which is what the respondent says he paid for the ticket to Colombia. There is also an itinerary cage which matches the itinerary on the receipt. In other words it shows the respondent departing Los Angeles November 20, and returning to Los Angeles on December 2. There is also the boarding pass which is dated December 2, which was the boarding pass he was supposed to use to travel from Houston to Los Angeles, and then the ticket holder that the respondent helped carry his tickets, which does not contain the name of a travel agency, but merely contains the name of Continental Airlines. Inside the ticket was his luggage tag which was issued in Bogota on December 2, 2002. Before the hearing resumed for the respondent to present evidence that the ticket was, in fact, changed as a result of his encounter with the paramilitaries, the Court received a motion from

his attorney to withdraw the application for withholding of removal, and that respondent would nevertheless be appealing the Judge's decision to pretermit his application for a 212(c) waiver. He also asked for an earlier hearing date which was unavailable so the case remained on the calendar today. That motion is in the record as Exhibit 25. At the resumed hearing on September 11th the respondent states that he does not wish to waive or withdraw his application for deferral of removal under the Convention against Torture, that he still fears torture. That the reason that he was thinking about withdrawing the application was that he was not able to get the evidence to show that the ticket that is in the record was not the original ticket that he used when he left the United States on November 20th. The respondent also stated that he wants the Court to know that he is seeking post-conviction relief. He is trying to get the sentence reduced on the conviction. No motions were submitted to show what efforts are being made in the criminal court to reduce the sentence. The respondent believes that some kind of motion has been filed, but in any even there is no indication that any post conviction relief has been obtained in this case.

The burden of proof in a deferral of removal application is upon the respondent to establish that it is more likely than not that if he returns to Colombia he would be tortured by the government or with the acquiescence of the government. The respondent does not fear the government here he is fearful of the paramilitaries who threatened him

before he left Colombia. The respondent says, however, that the paramilitaries and the police are very connected and that the paramilitaries, in essence, act with impunity.

One of the issues is the fact of respondent's credibility. Respondent's entire testimony in this case was that he fears returning to Colombia because of an encounter he had with paramilitaries on his trip to Colombia on November 20, 2002. Sometime during that trip he claims that and this is a period between November 20 and December 2, 2002, sometime during that trip paramilitaries came to his brother's store and asked for him and then the respondent went out and spoke to them and they wanted to know why he had made a complaint about their use of the brother's property and what interest he had in it, and they also threatened to wipe him out. The respondent said he became so frightened by this encounter that he decided to cut short his visit from Colombia. The respondent has gone to Colombia before in December of 1998, and stayed for Christmas and New Years, that he had intended to do the same thing on this trip. That he has also been there in March of 2002, and then this last trip of November of 2002. And, he was not frightened on the other trips it was this trip that led to his request for deferral of removal under the Convention against Torture. The respondent said that he had, had prior problems in Colombia, years ago he had been in demonstrations and he hated his country, but he has since returned and not had any problems with the government as a result of his participation in demonstration

years ago. He has also gone back as he stated and stayed for holidays and New Years and he has gone on other trips to Colombia and this is the first trip that he had a problem which he thinks entitles him to deferral of removal under the Convention against Torture. The Court finds that the respondent has not been credible. The respondent presented a ticket to the Immigration Service when he arrived in Houston, Texas not knowing that he was going to be confronting this problem with immigration being taken into custody and having to fight to try to keep his permanent resident status. He had no idea that this was going to happen when he arrived at the Houston airport on December 2, 2002. When he arrived there he handed them the ticket or he was carrying with him the ticket that he had used to travel out of the United States and back into the United States. The respondent claims that after he was threatened by the paramilitaries in his brother's store he became very frightened and just kept a very low profile until he was able to change his ticket and get a earlier ticket out of Colombia. That he went to a travel agency and he could not remember the name of it in Colombia, paid a $100 cash, did not have a receipt for that to show that in order to expedite his return to the United States. The Government presented as Exhibit 24 the e-ticket that the respondent used to travel to the United States on December 2, 2002. That ticket shows that it was issued October 29, 2002 by the Internet, which is what an e-ticket is, the respondent says that, that is how he obtained the ticket. It shows that he paid $449 that is what the respondent says he paid

by credit card. Where things differ between the ticket and the respondent is that this ticket issued in October 29, 2002, shows an itinerary for the respondent departing Los Angeles, November 20th and returning to Los Angeles on December 2. That is the itinerary that the respondent, in fact, used when he came to the United States on December 2. The respondent argues that even though that ticket is dated October 29, 2002, that, that, in fact, does not show the original itinerary that he traveled on. That this ticket dated October 29, 2002 was, in fact, changed and issued in Colombia sometime after he arrived in Colombia on November 20, 2002. The ticket very obviously states when it was issued and what itinerary was prepared and issued and charged for that ticket. The respondent wants the Court to believe that, that ticket is incorrect. He wants the Court to believe that the ticket is incorrect without any proof. He does not have any receipt showing the ticket was changed. He does not have any receipt showing what the original ticket showed. He does not have the original receipt from the Internet or anything from Continental Airlines to show that this ticket is not the ticket that he obtained on October 29, 2002. It is very obvious from the face of the ticket that the respondent went to Colombia on November 20, 2002, intending to return to the United States on December 2, 2002. Not only did he intend to do this that is, in fact, what he did. He did not return to the United States any earlier than he intended to return when he bought this ticket on October 29, 2002.

I do not find the respondent's testimony

credible about the encounter with the paramilitaries or the threats, or the fact that he was so frightened by it that he had to change his itinerary. The evidence is contrary to what the respondent is stating and I find that he has not established himself to be a credible witness. Accordingly, I am denying the application for deferral of removal under the Convention against Torture on the grounds that the respondent has failed to establish a credible claim or a claim that meets the definition of more likely than not that he would be subjected to torture.

There is no other relief available to the respondent, the only choice the Court has is to order him removed and deported to Colombia. Since this is an arriving alien case, he does not qualify for voluntary departure.

ORDER

IT IS ORDERED that respondent's application for cancellation of removal be denied;

IT IS FURTHER ORDERED that the application for a 212(c) waiver be denied.

IT IS FURTHER ORDERED that the application for deferral of removal under the Convention against Torture be denied.

IT IS FURTHER ORDERED that the respondent be removed and deported from the United States to Colombia on the charge contained in the Notice to Appear.

ROSE PETERS
Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before JUDGE ROSE PETERS in the matter of:

VICTOR WILLIAM MOLINA DE LA VILLA

A 20 065 527

San Pedro, California

is an accurate, verbatim transcript of the cassette tape as provided by the Executive Office for Immigration Review and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

____/signature/_____

Elizabeth Thomas, Transcriber

Free State Reporting, Inc.
1324 Cape St. Claire Road
Annapolis, Maryland 21401
(301) 261-1902

October 30, 2003
(completion date)

By submission of this CERTIFICATE PAGE, the Contractor certifies that a Sony BEC/T-147, 4-channel transcriber or equivalent, as described in Section C, paragraph C.3.3.2 of the contract, was used to transcribe the Record of Proceeding shown in the above paragraph.

Title 8. Aliens and Nationality

Chapter 12. Immigration and Nationality

Subchapter II. Immigration

Part II. Admission Qualifications for Aliens; Travel Control of Citizens and Aliens

§ 1182. Inadmissible Aliens.

(c) Nonapplicability of subsection (a)(1) to (25), (30), and (31)

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of paragraphs (1) to (25), (30), and (31) of subsection (a) of this section. Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title.

Illegal Immigration Reform and Immigrant Responsibility Act

Pub. L. No. 104-208

Sept. 30, 1996.

Sec. 304. REMOVAL PROCEEDINGS; CANCELLATION OF REMOVAL AND ADJUSTMENT OF STATUS; VOLUNTARY DEPARTURE (REVISED AND NEW SECTIONS 239 TO 240C).

(b) REPEAL OF SECTION 212(c).–Section 212(c) (8 U.S.C. 1182(c)) is repealed.

Supreme Court, U.S.
FILED
FEB 17 2010
OFFICE OF THE CLERK

No. 09-640

In the Supreme Court of the United States

VICTOR WILLIAM MOLINA-DE LA VILLA, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

In 1996, Congress repealed Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c) (1994), which provided for a discretionary waiver of exclusion, and replaced it with another form of discretionary relief not available to aliens convicted of certain crimes, including aggravated felonies such as crimes of violence. In *INS* v. *St. Cyr*, 533 U.S. 289 (2001), this Court held that the repeal of Section 212(c) did not apply retroactively to an alien previously convicted of an aggravated felony through a plea agreement at a time when the conviction would not have rendered the alien ineligible for discretionary relief. The question presented is:

Whether this Court's holding in *St. Cyr* applies to an alien who was convicted of a crime of violence after trial, and who therefore did not relinquish his right to a trial in reliance on potential eligibility for a waiver under Section 212(c).

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 7
Conclusion 18

TABLE OF AUTHORITIES

Cases:

Aguilar v. *Mukasey*, 128 S. Ct. 2961 (2008) 7
Armendariz-Montoya v. *Sonchik*, 291 F.3d 1116 (9th Cir. 2002), cert. denied, 539 U.S. 902 (2003) 6, 7, 15
Atkinson v. *Attorney Gen.*, 479 F.3d 222 (3d Cir. 2007) 10, 12, 13, 16
Canto v. *Holder*, No. 08-4272, 2010 WL 308795 (7th Cir. Jan. 28, 2010) 13, 15
Chambers v. *Reno*, 307 F.3d 284 (4th Cir. 2002) 11
Cruz-Garcia v. *Holder*, 129 S. Ct. 2424 (2009) 7
Dias v. *INS*, 311 F.3d 456 (1st Cir. 2002), cert. denied, 539 U.S. 926 (2003) 10
Fernandez-Vargas v. *Gonzales*, 548 U.S. 30 (2006) .. 6, 9, 10
Ferguson v. *United States Att'y Gen.*, 563 F.3d 1254 (11th Cir. 2009), petition for cert. pending, No. 09-263 (filed Sept. 30, 2009) 10
Hem v. *Maurer*, 458 F.3d 1185 (10th Cir. 2006) 10, 16
Hernandez-Castillo v. *Gonzales*, 549 U.S. 810 (2006) 7
Hernandez-Castillo v. *Moore*, 436 F.3d 516 (5th Cir.), cert. denied, 549 U.S. 810 (2006) 10

Cases—Continued: Page

Hernandez de Anderson v. *Gonzales*, 497 F.3d 927 (9th Cir. 2007) 6, 10, 16
INS v. *St. Cyr*, 533 U.S. 289 (2001) ..... *passim*
Izumi Seimitsu Kogyo Kabushiki Kaisha v. *U.S. Philips Corp.*, 510 U.S. 27 (1993) 11
Jurado-Gutierrez v. *Greene*, 190 F.3d 1135 (10th Cir. 1999), cert. denied, 529 U.S. 1041 (2000) 15
Kellermann v. *Holder*, No. 08-3927, 2010 WL 252264 (6th Cir. Jan. 25, 2010) 10
LaGuerre v. *Reno*, 164 F.3d 1035 (7th Cir. 1998), cert. denied, 528 U.S. 1153 (2000) 15
Landgraf v. *USI Film Prods.*, 511 U.S. 244 (1994) 8, 9
Lawrence v. *Ashcroft*, 540 U.S. 910 (2003) 7
Lovan v. *Holder*, 574 F.3d 990 (8th Cir. 2009) 11, 16
Martin v. *Hadix*, 527 U.S. 343 (1999) 8, 10
Mbea v. *Gonzales*, 482 F.3d 276 (4th Cir. 2007) 10, 11
Olatunji v. *Ashcroft*, 387 F.3d 383 (4th Cir. 2004) 11
Ponnapula v. *Ashcroft*, 373 F.3d 480 (3d Cir. 2004) 11, 12, 15
Rankine v. *Reno*, 319 F.3d 93 (2d Cir.), cert. denied, 540 U.S. 910 (2003) 10, 15
Reyes v. *McElroy*, 543 U.S. 1057 (2005) 7
Saravia-Paguada v. *Gonzales*, 488 F.3d 1122 (9th Cir. 2007), cert. denied, 128 S. Ct. 2499 (2008) 6
Silva, In re, 16 I. & N. Dec. 26 (B.I.A. 1976) 2
St. Cyr v. *INS*, 229 F.3d 406 (2d Cir. 2000), aff'd, 533 U.S. 289 (2001) 15
Stephens v. *Ashcroft*, 543 U.S. 1124 (2005) 7
Thom v. *Gonzales*, 546 U.S. 828 (2005) 7

Cases—Continued: Page

United States v. *De Horta Garcia*, 519 F.3d 658 (7th Cir.), cert. denied, 129 S. Ct. 489 (2008) 10
Wood v. *Allen*, No. 08-9156 (Jan. 20, 2010) 11
Zamora v. *Mukasey*, 128 S. Ct. 2051 (2008) 7

Statutes, regulation and rule:

Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(d), 110 Stat. 1277 ..... 2, 3
Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546:
§ 304(b), 110 Stat. 3009-597 2
§ 321(b), 110 Stat. 3009-628 13
§ 321(c), 110 Stat. 3009-628 13
Immigration Act of 1990, Pub. L. No. 101-649, § 511, 104 Stat. 5052 2
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*:
8 U.S.C. 1101(a)(43)(F) 3
8 U.S.C. 1182(a)(2)(A)(i)(I) 5
8 U.S.C. 1182(c) (1994) (§ 212(c)) ..... *passim*
8 U.S.C. 1229b (§ 240A) 3
8 U.S.C. 1229b(a)(3) 3
8 C.F.R. 1212.3(h) 4
Sup. Ct. R. 14.1(a) 11

Miscellaneous: Page

Exec. Office for Immigration Review, U.S. Dep't of Justice, *FY 2008 Statistical Year Book* (2009) <http://www.justice.gov/eoir/statspub/fy08syb.pdf> 17

54 Fed. Reg. 47,586 (1989) 18

Section 212(c) Relief for Aliens with Certain Criminal Convictions Before April 1, 1997, 69 Fed. Reg. 57,826 (2004) 3

p. 57,828 4

In the Supreme Court of the United States

No. 09-640

VICTOR WILLIAM MOLINA-DE LA VILLA, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-8a) is not published in the *Federal Reporter* but is reprinted in 306 Fed. Appx. 389. The decisions of the Board of Immigration Appeals (Pet. App. 9a-12a) and the immigration judge (Pet. App. 13a-37a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 5, 2009. A petition for rehearing was denied on June 4, 2009 (Pet. App. 1a). On August 25, 2009, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including October 2, 2009. On September 23, 2009, Justice Kennedy further extended the time to November 1, 2009, and the petition

was filed on November 2, 2009 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Former Section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(c) (1994) (repealed 1996), authorized some permanent resident aliens domiciled in the United States for seven consecutive years to apply for discretionary relief from exclusion.[1]

Between 1990 and 1996, Congress enacted three statutes that "reduced the size of the class of aliens eligible for" relief under Section 212(c). *INS* v. *St. Cyr*, 533 U.S. 289, 297 (2001). In the Immigration Act of 1990, Pub. L. No. 101-649, § 511, 104 Stat. 5052, which was enacted on November 29, 1990, Congress made Section 212(c) unavailable to anyone who had been convicted of an aggravated felony and served a term of imprisonment of at least five years. In 1996, in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 440(d), 110 Stat. 1277, Congress further amended Section 212(c) to make ineligible for discretionary relief aliens previously convicted of certain criminal offenses, including aggravated felonies, irrespective of the length of the sentence served. See *St. Cyr*, 533 U.S. at 297 n.7. Later that year, in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 304(b), 110

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[1] While, by its terms, Section 212(c) applied only to exclusion proceedings, it was generally construed as applying to both exclusion and deportation proceedings. See *INS* v. *St. Cyr*, 533 U.S. 289, 295 (2001) (citing *In re Silva*, 16 I. & N. Dec. 26, 30 (B.I.A. 1976)). As petitioner notes (Pet. 2 n.1), this case involves the current equivalent of exclusion proceedings, because he was arrested at the border and charged with being inadmissible.

Stat. 3009-597, Congress repealed Section 212(c) in its entirety, and replaced it with Section 240A of the INA, 8 U.S.C. 1229b. The latter section now provides for a form of discretionary relief known as cancellation of removal that is not available to many criminal aliens, including those who have been convicted of an aggravated felony (which, as relevant here, includes a crime of violence that results in a prison sentence of at least a year). See 8 U.S.C. 1101(a)(43)(F), 1229b(a)(3).

In *St. Cyr*, this Court held, based on principles of non-retroactivity, that IIRIRA's repeal of Section 212(c) should not be construed to apply to an alien convicted of an aggravated felony through a plea agreement at a time when the conviction would not have rendered the alien ineligible for relief under former Section 212(c). 533 U.S. at 314-326. In particular, the Court explained that, before 1996, aliens who decided "to forgo their right to a trial" by pleading guilty to an aggravated felony "almost certainly relied" on the chance that, notwithstanding their convictions, they would still have some "likelihood of receiving [Section] 212(c) relief" from deportation. *Id.* at 325.

On September 28, 2004, after notice-and-comment rulemaking proceedings, the Department of Justice promulgated regulations to take account of the decision in *St. Cyr*. See *Section 212(c) Relief for Aliens with Certain Criminal Convictions Before April 1, 1997*, 69 Fed. Reg. 57,826 (2004). In its response to comments received on the proposed rule, the Department noted cases holding that "an alien who is convicted after trial is not eligible for [S]ection 212(c) relief under *St. Cyr*," and then stated that it "has determined to retain the distinction between ineligible aliens who were convicted after criminal trials[] and those convicted through plea agree-

ments." *Id.* at 57,828. That determination is reflected in the regulations, which make aliens ineligible to apply for relief under former Section 212(c) "with respect to convictions entered after trial." 8 C.F.R. 1212.3(h).

2. a. Petitioner is a native and citizen of Colombia. Pet. App. 13a. He obtained status as a lawful permanent resident of the United States in 1980 as a result of his having married a U.S. citizen in 1977. *Id.* at 21a, 23a. He filed an application to become a naturalized citizen but failed to complete the statutory process of naturalization. *Id.* at 21a-22a. He therefore remains an alien and is subject to removal under the INA. *Id.* at 22a.

In August 1989, petitioner approached a woman he did not know, who was walking with her two-year-old son to mail a bill and then attend a prayer service at her church. Without asking her permission, he drove alongside her and began taking photographs of her and her son. He got out of his car, jumped in front of her, and took more photographs. He asked whether he could take a picture of her son. She ignored him and proceeded to a mailbox. Administrative Record 1049 (A.R.).

When the woman returned from mailing the bill, petitioner again drove alongside her and her child and asked if he could buy them something. She declined. As she headed towards the church entrance, petitioner again got out of his car and ran up to her. With both hands, he pulled her pants down with a force sufficient to rip open the waistband seam and injure her neck. Petitioner said he intended to rape her and force her to have oral sex. She screamed, hit him, and broke free. Still carrying her two-year-old son, she was able to make it to the church entrance. A.R. 1049-1050.

Petitioner was arrested and charged under California law with assault with intent to commit rape. A.R.

1066. He pleaded not guilty, but at a jury trial in the California Superior Court for the County of Los Angeles, he was found guilty as charged. Pet. App. 15a; A.R. 1034, 1045.

In February 1990, the court sentenced petitioner to the maximum term of six years in prison, which was suspended on the condition that he serve one year in the county jail. A.R. 1027-1028. He appealed, challenging his sentence, but in December 1991 the California Court of Appeal for the Second Appellate District affirmed the judgment. A.R. 1048-1051.

b. After serving his felony sentence, petitioner visited his native Colombia on three separate occasions—in December 1998, March 2002, and November 2002. Pet. App. 21a. After the first two trips, immigration officers at the U.S. border did not question his admissibility. But in December 2002, upon his return to the United States from Bogota, he was detained by immigration inspectors because of his felony conviction. *Id.* at 13a-14a. As a result of the conviction, he was placed in removal proceedings and charged with being inadmissible (*i.e.*, removable), under 8 U.S.C. 1182(a)(2)(A)(i)(I), as an arriving alien who has been convicted of a crime involving moral turpitude. A.R. 1186-1188.

After a hearing, an immigration judge (IJ) found petitioner to be removable as charged. A.R. 293, 350. Petitioner sought a number of forms of relief or protection from removal, among them a waiver of inadmissibility under former Section 212(c). A.R. 1076-1082.

The IJ concluded that petitioner was not eligible for relief under former Section 212(c) because, unlike the alien in *St. Cyr*, petitioner did not enter into a guilty plea, and his conviction resulted from a jury verdict. Pet. App. 19a-20a; A.R. 413-414. After concluding that

petitioner was not eligible for any other relief from removal, the IJ ordered him removed to Colombia. Pet. App. 35a.

c. Petitioner appealed that ruling to the Board of Immigration Appeals (Board). A.R. 216-220. Adopting and affirming the IJ's ruling, the Board dismissed the appeal. Pet. App. 11a-12a. It concluded that petitioner was not eligible for a waiver of inadmissibility under former Section 212(c) because he had been convicted of a crime of violence after trial rather than a guilty plea. *Ibid.* (citing *Armendariz-Montoya* v. *Sonchik*, 291 F.3d 1116, 1121 (9th Cir. 2002), cert. denied, 539 U.S. 902 (2003)).

3. The court of appeals denied a petition for review in a brief, unpublished, per curiam opinion. Pet. App. 2a-8a. The court explained that petitioner had not relied on the existence of a potential waiver under Section 212(c) but, rather, "passively relied upon the fact that conviction for his crime did not result in deportation at the time." *Id.* at 7a. Moreover, the court distinguished petitioner's case from those in which there is some "affirmative post-conviction reliance" on former Section 212(c). *Id.* at 6a (discussing *Hernandez de Anderson* v. *Gonzales*, 497 F.3d 927 (9th Cir. 2007)). The court concluded that, because petitioner took no action that enhanced the significance of Section 212(c) relief to him in particular, "he cannot claim to have reasonably relied on it." *Id.* at 7a (citing *Saravia-Paguada* v. *Gonzales*, 488 F.3d 1122, 1134 (9th Cir. 2007), cert. denied, 128 S. Ct. 2499 (2008), and *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30, 44 n.10 (2006)).

The court of appeals, with no judge having requested a poll, denied a petition for rehearing en banc. Pet. App. 1a.

ARGUMENT

Petitioner contends that the Court should grant review to consider the applicability of Congress's 1996 repeal of Section 212(c) of the INA in the case of aliens who did not plead guilty to pre-1996 offenses that render them removable. The decision of the court of appeals does not warrant further review because petitioner's arguments lack merit. The courts of appeals have correctly recognized that reliance is a significant factor to be considered for purposes of retroactivity analysis, although it may be given different weight in different circuits and there is some variation about whether the requisite reliance must be actual (as opposed to objectively reasonable) reliance. Moreover, although petitioner claims he relied on the availability of Section 212(c) relief when he chose to go to trial, he has not explained how that prospect affected his decision. Furthermore, the underlying question involves the retroactive effect of a statutory repeal that occurred more than 13 years ago, and this Court has denied petitions urging a similar extension of *INS* v. *St. Cyr*, 533 U.S. 289 (2001), in a number of prior cases. See, *e.g.*, *Cruz-Garcia* v. *Holder*, 129 S. Ct. 2424 (2009); *Aguilar* v. *Mukasey*, 128 S. Ct. 2961 (2008); *Zamora* v. *Mukasey*, 128 S. Ct. 2051 (2008); *Hernandez-Castillo* v. *Gonzales*, 549 U.S. 810 (2006); *Thom* v. *Gonzales*, 546 U.S. 828 (2005); *Stephens* v. *Ashcroft*, 543 U.S. 1124 (2005); *Reyes* v. *McElroy*, 543 U.S. 1057 (2005); *Lawrence* v. *Ashcroft*, 540 U.S. 910 (2003); *Armendariz-Montoya* v. *Sonchik*, 539 U.S. 902 (2003).[2]

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[2] A similar question is presented in *Ferguson* v. *Holder*, petition for cert. pending, No. 09-263 (filed Sept. 30, 2009).

1. Petitioner argues (Pet. 30) that the decision below conflicts with this Court's retroactivity analysis, and that the court of appeals should not have treated the prospect of reliance as having "dispositive weight" in the retroactivity analysis. That objection lacks merit. As this Court has explained, in determining whether a statute has a retroactive effect, a court must make a "commonsense, functional judgment" that "should be informed and guided by 'familiar considerations of fair notice, reasonable reliance, and settled expectations.'" *Martin* v. *Hadix*, 527 U.S. 343, 357-358 (1999) (quoting *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 270 (1994)).

In *St. Cyr* itself, this Court placed considerable emphasis on the fact that "[p]lea agreements involve a *quid pro quo*," whereby, "[i]n exchange for some perceived benefit, defendants waive several of their constitutional rights (including the right to a trial) and grant the government numerous tangible benefits." 533 U.S. at 321-322 (citation and internal quotation marks omitted). In light of "the frequency with which [Section] 212(c) relief was granted in the years leading up to AEDPA and IIRIRA," the Court concluded that "preserving the possibility of such relief would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial." *Id.* at 323. And because the Court concluded that aliens in St. Cyr's position "almost certainly relied upon th[e] likelihood [of receiving Section 212(c) relief] in deciding whether to forgo their right to a trial," the Court held that "the elimination of any possibility of [Section] 212(c) relief by IIRIRA has an obvious and severe retroactive effect." *Id.* at 325.

That focus on reliance was consistent with the Court's prior cases. In *Landgraf*, the Court specifically

identified "reasonable reliance" as a consideration that "offer[s] sound guidance" in evaluating retroactivity, 511 U.S. at 270. See also *St. Cyr*, 533 U.S. at 321 (quoting same). Whether a statute's application would have a retroactive effect necessarily depends on "transactions" and "considerations already past" that are associated with a particular case. *Landgraf*, 511 U.S. at 269-270 (quotation marks omitted). Nothing in *St. Cyr* suggested that any alien who was eligible for Section 212(c) relief before its repeal would remain forever eligible. To the contrary, the Court held that Section "212(c) relief remains available for aliens, *like respondent, whose convictions were obtained through plea agreements* and who, notwithstanding those convictions, would have been eligible for [Section] 212(c) relief at the time of their plea under the law then in effect." 533 U.S. at 326 (emphasis added).

Moreover, this Court's most recent decision addressing retroactivity in the immigration context explicitly discussed *St. Cyr* and reconfirmed the importance of reliance. In *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30 (2006), the Court stated that *St. Cyr* "emphasized that plea agreements involve a *quid pro quo* * * * in which a waiver of constitutional rights * * * had been exchanged for a perceived benefit * * * valued in light of the possible discretionary relief, a focus of expectation and reliance." *Id.* at 43-44 (citations and internal quotation marks omitted). Distinguishing the situation of the alien in *Fernandez-Vargas* from that of the alien in *St. Cyr*, the Court remarked that, "before IIRIRA's effective date Fernandez-Vargas never availed himself of [provisions providing for discretionary relief] or took action that enhanced their significance to him in particu-

lar, as St. Cyr did in making his *quid pro quo* agreement." *Id.* at 44 n.10.

Thus, the court of appeals did not err in considering the prospect of reasonable reliance as part of its "commonsense, functional" judgment about retroactivity. *Martin*, 527 U.S. at 357.

2. Petitioner contends (Pet. 13-30) that this case offers a suitable vehicle to resolve a conflict among the circuits as to the continued availability of relief under former Section 212(c) to aliens who were convicted of crimes before the enactment of AEDPA and IIRIRA.

The disagreement in the analysis of the circuits, however, is narrow. Nine circuits have declined to extend the holding of *St. Cyr* as a general matter to aliens who were convicted after going to trial rather than pleading guilty. See *Dias* v. *INS*, 311 F.3d 456, 458 (1st Cir. 2002), cert. denied, 539 U.S. 926 (2003); *Rankine* v. *Reno*, 319 F.3d 93, 102 (2d Cir.), cert. denied, 540 U.S. 910 (2003); *Mbea* v. *Gonzales*, 482 F.3d 276, 281-282 (4th Cir. 2007); *Hernandez-Castillo* v. *Moore*, 436 F.3d 516, 520 (5th Cir.), cert. denied, 549 U.S. 810 (2006); *Kellermann* v. *Holder*, No. 08-3927, 2010 WL 252264, at *5-*7 (6th Cir. Jan. 25, 2010); *United States* v. *De Horta Garcia*, 519 F.3d 658, 661 (7th Cir.), cert. denied, 129 S. Ct. 489 (2008); *Hernandez de Anderson* v. *Gonzales*, 497 F.3d 927, 940 (9th Cir. 2007); *Hem* v. *Maurer*, 458 F.3d 1185, 1189 (10th Cir. 2006); *Ferguson* v. *United States Att'y Gen.*, 563 F.3d 1254, 1259-1271 (11th Cir. 2009), petition for cert. pending, No. 09-263 (filed Sept. 30, 2009). Two circuits have held that no showing concerning reliance is required and that new legal consequences attached by IIRIRA to an alien's conviction were sufficient to prevent the BIA from precluding Section 212(c) relief. See *Atkinson* v. *Attorney Gen.*, 479 F.3d 222, 231

(3d Cir. 2007); *Lovan* v. *Holder*, 574 F.3d 990, 994 (8th Cir. 2009) (following *Atkinson* with little further analysis).[3]

In *Atkinson*, the Third Circuit retreated from dictum in *Ponnapula* v. *Ashcroft*, 373 F.3d 480 (2004), which had suggested that an alien who had not been offered a guilty plea would be unable to establish reliance for purposes of retroactivity analysis, *id.* at 494. The Third Circuit in *Atkinson* held that the repeal of Section 212(c) should not be construed to apply retroactively to "aliens

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[3] Petitioner cites (Pet. 20) the Fourth Circuit's decision in *Olatunji* v. *Ashcroft*, 387 F.3d 383 (2004), as rejecting a reliance requirement for retroactivity analysis. The retroactivity issue in *Olatunji*, however, involved the loss of an alien's ability to take brief trips abroad without subjecting himself to removal proceedings, *id.* at 395-396, rather than the loss of access to Section 212(c) relief. *Olatunji* itself distinguished the Fourth Circuit's prior decision in *Chambers* v. *Reno*, 307 F.3d 284 (2002), which involved Section 212(c). See *Olatunji*, 387 F.3d at 392 (discussing *Chambers*, 307 F.3d at 293). As petitioner acknowledges (Pet. 20), even after *Olatunji*, the Fourth Circuit has—directly contrary to petitioner's argument on the merits—continued to hold that "IIRIRA's repeal of [Section] 212(c) did not produce an impermissibly retroactive effect as applied to an alien convicted after trial." *Mbea*, 482 F.3d at 281.

Petitioner suggests in passing (Pet. 26 n.13) that this case could be used as a vehicle to decide the retroactivity question at issue in *Olatunji*, about the use of removal proceedings when permanent residents return from trips abroad. But that question is not fairly included in the question presented by the petition, which addresses only the repeal of Section 212(c). Pet. i; see Sup. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."); *Wood* v. *Allen*, No. 08-9156 (Jan. 20, 2010), slip op. 13 (refusing to address an issue discussed in a petition for certiorari because "Rule 14.1(a) requires that a subsidiary question be fairly included in the *question presented* for our review") (quoting *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 510 U.S. 27, 31 n.5 (1993) (per curiam)).

who, like Atkinson, had not been offered pleas and who had been convicted of aggravated felonies following a jury trial at a time when that conviction would not have rendered them ineligible for [S]ection 212(c) relief." 479 F.3d at 229-230.

The *Atkinson* court's analysis was based on the observation that this Court "has never held that reliance on the prior law is an element required to make the determination that a statute may be applied retroactively." 479 F.3d at 227-228. But that result cannot be squared with the rationale of *St. Cyr*, which specifically identified "reasonable reliance" as an important part of the "commonsense, functional judgment" in retroactivity analysis, and then explicitly rested its holding on the assessment that it was likely that aliens who pleaded guilty prior to 1996 had reasonably relied on the possible availability of Section 212(c) relief. See 533 U.S. at 321-323. If the Third Circuit's view that retroactivity analysis turns on the fact of conviction simpliciter were correct, then that entire discussion in *St. Cyr* was superfluous.

Furthermore, the Court's analysis in *St. Cyr* was focused on the prospect of detrimental reliance by an alien who pleaded guilty between 1990, when Congress enacted the bar to Section 212(c) relief for aliens who served more than five years on a sentence for an aggravated felony, and 1996, when Congress repealed Section 212(c) altogether. See 533 U.S. at 293 (describing the facts of St. Cyr's case); *id.* at 297 (describing 1990 enactment); *id.* at 323 (describing circumstances of an alien whose "sole purpose" in plea negotiations was to "ensure" a sentence of less than five years). During that six-year period, an alien concerned about preserving eligibility for relief under Section 212(c) would have had an incentive to enter into a plea agreement that pro-

vided for a sentence of five years or less, rather than go to trial and risk a longer (and disqualifying) sentence, and accordingly may have developed reasonable reliance interests. Petitioner, by contrast, was convicted prior to the 1990 amendment. See Pet. App. 15a; Pet. 6 n.3. At that time, a criminal conviction was not disqualifying under Section 212(c) regardless of the length of the sentence served. Indeed, petitioner's conviction did not even render him deportable until IIRIRA later classified it as an aggravated felony, in a provision that petitioner "does not dispute" applies retroactively. Pet. 7 n.4; see IIRIRA § 321(b) and (c), 110 Stat. 3009-628. As a result, preserving eligibility for relief under Section 212(c) could not reasonably have been expected to play a role in an alien's strategic decisions in such a criminal prosecution.

In any event, the deviation in the circuits' analysis is narrow, because the Third Circuit nonetheless acknowledged that reliance is "but one consideration." *Atkinson*, 479 F.3d at 231. As a result, its split from the other circuits' analysis extends only to whether a determination of retroactive effect *must* turn on reliance. No circuit has denied that a determination of retroactive effect *may* be based on reliance. As the Seventh Circuit recently noted, "the distinction between [its] analysis" and "that of the Third, Eighth, and Tenth Circuits * * * is one of fine line drawing." *Canto* v. *Holder*, No. 08-4272, 2010 WL 308795, at *5 (Jan. 28, 2010).

3. In the alternative, petitioner claims (Pet. 32-33) that, even if reliance is a significant factor in evaluating retroactive effect, he reasonably relied on the continued availability of Section 212(c) relief in making his decision to go to trial rather than plead guilty. That argument is unpersuasive.

The petition suggests that reliance in these circumstances is established because the decision "whether or not to go to trial" is "the same decision as the one at issue in *St. Cyr*." Pet. 32 (emphasis omitted). But someone does not necessarily rely on the same things in making one choice (to plead guilty) rather than the other (to go to trial). In *St. Cyr*, the alien gave up the chance to prove his innocence at a trial in reliance upon the potential that Section 212(c) relief—which would remain available if he received a sentence of five years or less—would mitigate the effects of the resulting conviction, which included rendering him deportable. Here, by contrast, petitioner did not forgo anything in choosing to go to trial rather than plead guilty. At the hearing before the IJ, petitioner's attorney explained that petitioner could testify "that he had offered to plead [guilty] to simple assault, but the District Attorney would not accept that plea," and that, rather than "trying to plea[d] to a higher offense in hopes of getting a lower sentence," petitioner chose "to go forward at trial in the hopes that he could prove his innocence, but also with the knowledge that under the law, at the time in early 1990, he would have qualified for a [*sic*] 212(c) relief." A.R. 407. According to that proffer, petitioner did not, for example, forgo an opportunity to plead guilty to a lesser offense. Instead, his attempt to plead guilty to a lesser offense was rebuffed. Thus, unlike the alien in *St. Cyr*, petitioner still has not explained how, by going to trial on the greater offense of assault with intent to commit rape, he gave up anything in reliance on the prospect of Section 212(c) relief.

As the Seventh Circuit recently explained, even though *St. Cyr* recognized that "it is more than likely that those aliens faced with plea agreements contem-

plated their ability to seek [S]ection 212(c) relief, the same logic cannot necessarily be extended to those aliens convicted at trial" because they did not, as a categorical matter, "forgo any possible benefit in reliance on [S]ection 212(c)." *Canto*, 2010 WL 308785, at *6. And no court has interpreted this Court's retroactivity analysis to find a retroactive effect based on new consequences to *every* prior decision or action. To the contrary, several courts have specifically held that the prior decision to commit a crime is not protected against application of Section 212(c)'s repeal, whether the alien asserted possible reliance on not getting caught, or acquittal at trial, or a sentence that does not bar relief, or the continued availability of relief at all. See *Ponnapula*, 373 F.3d at 495-496 & n.14; *Rankine*, 319 F.3d at 101-102; *Armendariz-Montoya* v. *Sonchik*, 291 F.3d 1116, 1121 (9th Cir. 2002), cert. denied, 539 U.S. 902 (2003); *Jurado-Gutierrez* v. *Greene*, 190 F.3d 1135, 1150-1151 (10th Cir. 1999), cert. denied, 529 U.S. 1041 (2000); *LaGuerre* v. *Reno*, 164 F.3d 1035, 1041 (7th Cir. 1998), cert. denied, 528 U.S. 1153 (2000). Indeed, in the decision that this Court affirmed in *St. Cyr*, the Second Circuit explained that "[i]t would border on the absurd to argue" that aliens "might have decided not to commit" crimes "or might have resisted conviction more vigorously, had they known that if they were not only imprisoned but also * * * ordered deported, they could not ask for a discretionary waiver of deportation." *St. Cyr* v. *INS*, 229 F.3d 406, 418 (2000) (quoting *Jurado-Gutierrez*, 190 F.3d at 1150, and *LaGuerre*, 164 F.3d at 1041), aff'd, 533 U.S. 289 (2001). Yet, that is the sort of result to which petitioner's alternative interpretation of retroactive effect would lead.

Petitioner's circumstances in fact are quite distinct from those of aliens on whom Section 212(c)'s repeal was held to have a retroactive effect by virtue of the prospect of reasonable reliance based on some action other than a guilty plea. The alien in the Ninth Circuit's decision in *Hernandez de Anderson* took the affirmative step of bringing "herself—and her criminal convictions —to the INS's attention by applying for naturalization," and, in doing so, had relied upon the potential availability of suspension of deportation by waiting to apply for naturalization until she had accrued the ten years of continuous residence that made her eligible for such relief. 497 F.3d at 936-937, 941-943. The alien in the Tenth Circuit's decision in *Hem* made an objectively reasonable decision to forgo a right to an appeal that would have put him "at risk of being sentenced to a sentence longer than 5 years * * * making him ineligible for [Section] 212(c) relief" after 1990. 458 F.3d at 1199.[4]

Petitioner, by contrast, has identified no affirmative act that he committed in possible reliance on the availability of Section 212(c) before its repeal. His decision to go to trial rather than plead guilty could not have been intended to reduce the risk of a sentence that would bar relief under Section 212(c), because the five-year-imprisonment ceiling was not added to Section 212(c) until several months after his conviction, and his conviction did not even render him deportable in the first instance until IIRIRA was enacted. See p. 13, *supra*. Nor, according to the terms of his proffer, was his decision to go to trial made with the intention of avoid-

[4] The aliens in *Atkinson* and *Lovan* were also both convicted after the 1990 narrowing of Section 212(c) relief on the basis of sentence length, on which this Court focused in *St. Cyr*. See p. 12, *supra*; *Atkinson*, 479 F.3d at 224; *Lovan*, 574 F.3d at 992.

ing exposure to a potential conviction for a greater offense. A.R. 407. Petitioner thus has pointed to no act or transaction that raises even the prospect of reasonable reliance.

4. Finally, petitioner also cannot avoid the fact that the question he presents involves the retroactive effect of a statutory repeal that occurred more than 13 years ago.

Petitioner cites (Pet. 22-23) statistics about the frequency with which Section 212(c) relief has been granted in the last several years. That number declined from 1905 grants in FY 2004 to 1049 grants in FY 2008. See Exec. Office for Immigration Review, U.S. Dep't of Justice, *FY 2008 Statistical Year Book* Table 15, at R3 (2009) <http://www.justice.gov/eoir/statspub/fy08syb.pdf>. Although the *Statistical Year Book* for FY 2009 has not yet been published, the corresponding number for FY 2009 is expected to be 858 grants—reflecting a 55% decline since FY 2004. Similarly, according to other unpublished statistics compiled by the Executive Office of Immigration Review, the number of applications for Section 212(c) relief has fallen dramatically. In FY 2004, there were 2617 applications; in FY 2008, there were 1281; and in FY 2009, there were 576. That reflects a 78% decline since FY 2004—and a 55% decline since FY 2008. Moreover, because most criminal defendants plead guilty, the number of aliens affected by the general rule in the circuits that Section 212(c) does not apply to an alien who was convicted after a trial would be only a small fraction of those numbers.

Petitioner also suggests (Pet. 23-24) that new cases will continue to arise when aliens with old convictions travel abroad, apply for status changes, renew their permanent residency or "green" cards, or are arrested in

worksite raids. Yet, because green cards issued after 1989 expire after ten years, see 54 Fed. Reg 47,586 (1989), nearly all lawful permanent residents who are removable on the basis of pre-IIRIRA convictions have already been exposed to immigration authorities at some point since 2000—which further shrinks the pool of those who might still have new proceedings initiated against them on the basis of pre-1996 convictions.

Thus, there is still every reason to believe that this is an issue of diminishing prospective importance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 09-640

IN THE

Supreme Court of the United States

VICTOR MOLINA DE LA VILLA,

Petitioner,

—v.—

ERIC HOLDER,
ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. The Conflict Between the Circuits Is Widespread and Significant 1

II. The Issue Will Affect Numerous Cases for Years to Come 5

III. The Ninth Circuit's Decision Is Wrong 8

CONCLUSION 12

TABLE OF AUTHORITIES

CASES

Camins v. Gonzales,
500 F.3d 872 (9th Cir. 2007).....4

Fernandez-Vargas v. Gonzales,
548 U.S. 30 (2006).....4

Hughes Aircraft Co. v. Schumer,
520 U.S. 939 (1997).....3, 9

INS v. St. Cyr,
533 U.S. 289 (2001).....3, 4, 9, 11

Kellerman v. Holder,
592 F.3d 700 (6th Cir. 2010).....2

Landgraf v. USI Film Prods.,
511 U.S. 244 (U.S. 1994) 2, 3, 9, 10

Martin v. Hadix,
527 U.S. 343 (1999).....3

Rivers v. Roadway Express, Inc.,
511 U.S. 298 (1994).....2, 9

Saravia-Paguada v. Gonzales,
488 F.3d 1122 (9th Cir. 2007).....3

Thom v. Ashcroft,
369 F.3d 158 (2d Cir. 2004) 10

FEDERAL STATUTES AND REGULATIONS

8 U.S.C. § 1101(a)(13) (2010) 4

8 U.S.C. § 1182(c), Immigration and Nationality Act § 212(c) (1990) ..... *passim*

8 C.F.R. § 1212.3(f)(4) (2010) 11

8 C.F.R. § 1212.3(f)(4)(ii) (2010) 11

JUDICIAL MATERIALS

Petition for a Writ of Certiorari, *United States v. O'Brien & Burgess*, No. 08-1569, *cert. granted*, 130 S. Ct. 49 (2009) 4

Brief for the United States in Opposition, *Zamora v. Mukasey*, 128 S. Ct. 2051 (2008) 5

OTHER AUTHORITIES

Executive Office for Immigration Review, U.S. Dep't of Justice, FY 2007 Statistical Year Book R3 (2008), http://www.justice.gov/eoir/statspub/fy07syb.pdf 6

Executive Office for Immigration Review, U.S. Dep't of Justice, FY 2008 Statistical Year Book R3 (2009), http://www.justice.gov/eoir/statspub/fy08syb.pdf 6

Interoffice Memorandum from Michael L. Aytes, Assoc. Dir. Of Domestic Operations, U.S. Citizenship and Immigration Servs., U.S. Dep't of Homeland Sec., to Reg'l, Dist., Field Office and Serv. Ctr. Dirs. and Nat'l Benefits Ctr. Dr. (May 11, 2007), http://www.uscis.gov/files/pressrelease/I90EPSNS051107.pdf.....7

Office of Immigration Statistics, Dep't of Homeland Sec., *Estimates of the Legal Permanent Resident Population in 2008* Table 3 (2009), http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_lpr_pe_2008.pdf 8

U.S. Immigration and Customs Enforcement, Secure Communities, http://www.ice.gov/secure_communities/deployment/ (last visited Feb. 23, 2010).....7

REPLY BRIEF FOR THE PETITIONER

This case cleanly presents an issue on which *eleven* circuits have reached four different conclusions, and which will affect, at a minimum, hundreds of cases for years to come. The government attempts to characterize the split as "narrow," but the dispute has already cast doubt on the meaning of this Court's retroactivity jurisprudence, and will necessarily cause further conflict in other areas of immigration law. The government cites statistics showing that the issue will affect "only" hundreds of cases in the coming years, but the statistics are misleading and, as the government's own data shows, probably inaccurate. Finally, the government does not dispute that this case presents a comprehensive vehicle for resolving all aspects of this circuit split.

I. The Conflict Between the Circuits Is Widespread and Significant.

The government cannot seriously dispute that the split in the circuits on the question presented is almost as severe as it could possibly be. Eleven of the twelve circuits have now decided the question presented, and in doing so have adopted four different views, with two circuits suffering from significant internal division. At least five of those circuits have rejected the government's position (as embodied in its regulations), as has a sixth in its most recent ruling. *See* Pet. for Cert. at 13-17 (Second, Third, Fifth, Eighth, and Tenth Circuits allow at least some non-citizens convicted by trial to

establish retroactive effect, as does the last published decision from the Ninth Circuit).[1]

The government mistakenly argues that the disagreement among the circuits is "narrow," BIO at 10, characterizing the split as a dispute over whether reliance is just "one consideration" in determining retroactive effect or instead is a prerequisite to such a showing. BIO at 13. However, this characterization ignores the massive doctrinal and practical difference between a rule that reliance is a *prerequisite* to show retroactive effect and a rule that reliance is one significant factor to consider in determining retroactive effect. In those circuits where reliance is a prerequisite to finding retroactive effect, the continuing validity of cases such as *Landgraf*, *Rivers*, and *Hughes* will remain in doubt, because in each of those cases this Court found retroactive effect without *any* showing of reliance. *See* Pet. for Cert. at 15; *see also Landgraf v. USI Film Prods.*, 511 U.S. 244, 282-86 (1994) (holding that provision allowing punitive damages in sex discrimination cases created retroactive effect, even though sex discrimination was unlawful prior to the law's enactment); *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 313-14 (1994) (holding that an increase in monetary liability for race discrimination created retroactive effect even

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[1] Another circuit has recently joined the two circuits that have adopted the government's view. *Kellerman v. Holder*, 592 F.3d 700, 705-06 (6th Cir. 2010) (apparently adopting the view of the First and Seventh Circuits that only non-citizens who plead guilty can show retroactive effect). *Kellerman*'s discussion of the nature of the circuit split is yet more evidence of widespread confusion on this issue in the courts of appeal. *See id.*

though race discrimination was understood to be prohibited at the time the conduct occurred); *Hughes Aircraft Co. v. Schumer*, 520 U.S. 939, 947 (1997) (holding that law eliminating defense against suits alleging fraud in government contracts created retroactive effect, even though such fraud had been unlawful since 1863). Indeed, the Ninth Circuit suggested that *Landgraf* itself had been undermined by the Court's later retroactivity cases in the precedent decision relied upon by the panel in this case. *See Saravia-Paguada v. Gonzales*, 488 F.3d 1122, 1133 (9th Cir. 2007) ("Petitioner overlooks, moreover, that the central focus of [*Martin v. Hadix*, 527 U.S. 343 (1999) and *INS v. St. Cyr*, 533 U.S. 289 (2001)], both of which post-date *Landgraf* and *Hughes Aircraft*, was the party's reliance interest."). Such confusion concerning the governing retroactivity caselaw will continue absent this Court's intervention.

The split at issue also has tremendous practical significance. Thousands of immigrants will be denied relief in those circuits where the government's regulation implementing *St. Cyr* was upheld. Nor will the resulting conflict be limited to 212(c) cases; the divide over this issue will also create parallel splits in other areas of immigration law involving retroactivity analysis, because various other forms of immigration relief also turn on criminal history. This too has already begun, as the government does not dispute. *See* Pet. for Cert. at 26-27.[2]

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[2] The government asserts that this case cannot serve to resolve circuit splits on these parallel issues, including one which

The government also states that the Court reconfirmed the "importance of reliance" in *Fernandez-Vargas v. Gonzales*, 548 U.S. 30 (2006). BIO at 9. But the question that has split the circuits is not whether reliance is important, but whether it is dispositive. Two courts of appeals have rejected the view that reliance is a prerequisite since *Fernandez-Vargas* was decided, which should put to rest the suggestion that it provided clarity with respect to the proper role of reliance. *Cf.* Pet. for Cert. at 12 n.8 (arguing that a different passage of *Fernandez-Vargas* makes clear that reliance is *not* required).

The government notes that this Court has denied other petitions for certiorari presenting these issues. However, the Court denied most of those petitions before the split became acute, and all of them arose before the Eighth Circuit joined the Third, thereby creating two circuits where reliance is in no way a prerequisite to showing retroactive effect. *See* U.S. Pet. at 11-13, *United States v. O'Brien & Burgess*, No. 08-1569, *cert. granted*, 130 S. Ct. 49 (2009) (arguing that a different split was unlikely to resolve itself once a second circuit adopted the minority viewpoint).

Petitioner raised below in this case, because these issues are not fairly presented in the question. BIO at 11 n.3. But the Court would necessarily resolve the parallel disputes in these other contexts if it decided this case, because the issue in those cases is analytically identical to the one presented here, as the courts of appeals have recognized. *See, e.g., Camins v. Gonzales*, 500 F.3d 872, 880-82 (9th Cir. 2007) (citing *St. Cyr* and circuit caselaw interpreting 212(c) to resolve parallel retroactivity issue concerning effect of convictions predating enactment of 8 U.S.C. § 1101(a)(13) (2010)).

Most important, the government does not argue here, as it did in earlier petitions, that the question is not cleanly presented. Petitioner argued below that reliance was not required to establish retroactive effect, that he could show that he relied on the availability of Section 212(c) under both an objective and a subjective test, and that he was entitled to the opportunity to make an individualized showing if in fact such a showing is required. *See* Pet. for Cert. at 8-10, 32-33. This Court can resolve the disagreements over the question presented comprehensively in this case, and thereby bring much-needed uniformity to this area of the law.[3]

II. The Issue Will Affect Numerous Cases for Years to Come.

The government also errs in arguing, as it has repeatedly over the last several years, that the split at issue here is insignificant because the underlying statute is too old to affect a large number of cases. However, the government's data on this question appears too unreliable to support its claim, and in any event does not account for recent improvements in databases and more vigorous enforcement initiatives that will bring many new lawful permanent residents with very old convictions into the system for years to come. *See* Pet. for Cert. at 22-25.

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[3] The government also argued in response to earlier petitions that the Court should delay review in light of a then-recent BIA regulation, but it no longer advances that argument, likely because the regulation has not been accorded deference by any circuit to consider the question. *See* BIO at 14, *Zamora v. Mukasey*, 128 S. Ct. 2051 (2008).

The government relies on statistics from the most recent data concerning Section 212(c) relief to argue that the number of existing applications is decreasing rapidly. BIO at 17. Those statistics are misleading for several reasons.

First, the statistics relied upon by the government are of questionable reliability. The government's own information concerning the number of Section 212(c) grants in any given year has varied dramatically, and (to the extent there is any trend), have shown a substantial increase in the number of recorded 212(c) grants. For example, in 2007 government data recorded only 392 grants for fiscal year ("FY") 2004, but in its data for 2008 the same number (that is, 212(c) grants in FY 2004) jumped to 1,905. [4] Similar anomalies in the government's data exist for other fiscal years as well. If the government relied on the earlier numbers to determine that the number of potential cases would be small, it should have re-visited that conclusion in light of the massive increase recorded by its own data.

In any event, the small sample size of five years here hardly reveals a trend in the number of applications. The government asserts a drop of 55 percent over five years, BIO at 17, but the individual years reveal no trend. According to the 2009 data (which of course may be revised substantially in 2010

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[4] *Compare* Executive Office for Immigration Review, U.S. Dep't of Justice, FY 2007 Statistical Year Book R3 (2008), http://www.justice.gov/eoir/statspub/fy07syb.pdf, *with* Executive Office for Immigration Review, U.S. Dep't of Justice, FY 2008 Statistical Year Book R3 (2009), http://www.justice.gov/eoir/statspub/fy08syb.pdf.

or later), the number of applications actually *increased* from FY 2005 to 2006, and dropped less than three percent from FY 2006 to 2007. At best, this data reveals only that while there may be some fluctuations in the number of applications in the future, there will be hundreds of them either way.

The data at issue also likely understates the number of forthcoming 212(c) applications because it fails to account for new initiatives that will bring more long-time lawful permanent residents into the system. *See* Pet. for Cert. at 24. In particular, two of the initiatives that will likely cause an increase in Section 212(c) applications are very recent.

The "Secure Communities" initiative, which will ultimately result in immigration checks for everyone brought to a county jail, was only initiated in selected cities in 2009, and will not be fully implemented until 2013.[5] Similarly, the program to perform criminal background checks on people renewing their lawful permanent residence cards appears to have begun only in 2006.[6] If that initiative is generating a large number of new cases, many of those cases have probably not yet been filed in the federal courts. Moreover, the renewal

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[5] *See* U.S. Immigration and Customs Enforcement, Secure Communities, http://www.ice.gov/secure_communities/deployment/ (last visited Feb. 23, 2010).

[6] *See* Interoffice Memorandum from Michael L. Aytes, Assoc. Dir. Of Domestic Operations, U.S. Citizenship and Immigration Servs., U.S. Dep't of Homeland Sec., to Reg'l, Dist., Field Office and Serv. Ctr. Dirs. and Nat'l Benefits Ctr. Dr. (May 11, 2007), *available at* http://www.uscis.gov/files/pressrelease/I90EPSNS051107.pdf.

obligation itself only applies to those who obtained green cards after 1989. As a result, approximately three million people who, like Mr. Molina, obtained their green cards prior to that date will encounter the system only in the future, when they travel abroad, are subjected to a worksite raid, or are stopped by police for some other reason.[7]

III. The Ninth Circuit's Decision Is Wrong.

The government spends much of its brief defending the Ninth Circuit's decision on several different rationales, some of which are inconsistent with the government's own regulations. For present purposes, the critical point is that its arguments have been rejected in their entirety by two circuits, and in large part by three more (with at least some panels in at least three others also likely disagreeing with the government's view). Beyond that, only a few points bear mention.

First, the government appears to assume that Mr. Molina faced no immigration consequences at all from his conviction at the time it occurred, and therefore could not have relied on 212(c) relief. *See* BIO at 13. This is erroneous; the conviction rendered him excludable, and he therefore needed Section 212(c) relief to ensure his re-admission in the event that he took a "meaningfully interruptive" trip abroad. *See* Pet. for Cert. at 6. Of course, that consequence is minor compared to the massive

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[7] *See* Office of Immigration Statistics, Dep't of Homeland Sec., *Estimates of the Legal Permanent Resident Population in 2008* Table 3 (2009), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_lpr_pe_2008.pdf.

consequence he faces now if he cannot apply for relief – permanent mandatory deportation – but this only proves that the retroactive effect is severe in this case.

Second, the government claims that the view of the Third Circuit, which is now also the view of the Eighth Circuit, must be incorrect because *St. Cyr*'s discussion of the *quid pro quo* aspect of the guilty plea process would have been superfluous had this view been correct. However, *St. Cyr* focused not only on the *quid pro quo* exchange, but also on altering the consequences of "deciding whether to accept a plea offer or instead to proceed to trial," *St. Cyr*, 533 U.S. at 323. The logic of that statement as well as others in *St. Cyr* unquestionably applies to people who ultimately decided to go to trial. *See id.* at 322 ("as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions."). In any event, *St. Cyr* did not purport to foreclose other possible sources of retroactive effect, which is unsurprising given that the Court had no need to look beyond the guilty plea, given the "obvious and severe" retroactive effect with respect to that past transaction. *St. Cyr*, 533 U.S. at 325.

Third, while the government suggests that retroactive effect could not possibly be tied to the underlying criminal conduct itself, BIO at 15, that claim is hardly as outrageous as the government suggests. This Court has already found retroactive effect with respect to laws increasing the penalty associated with previously-unlawful sexual harassment, race discrimination, and fraud in government contracting. *See Landgraf*, 511 U.S. at 282; *Rivers*, 511 U.S. at 302-03; *Hughes*, 520 U.S. at

947. Indeed, given that the retroactive effect doctrine owes its origin to *Ex Post Facto* principles, one would think the analogy to criminal conduct an obvious starting point for retroactivity analysis. *See Landgraf*, 511 U.S. at 266-268; *see also Thom v. Ashcroft*, 369 F.3d 158, 163 n.6 (2d Cir. 2004) (Calabresi, J.).

The government also suggests that knowing the true immigration consequences would have served no purpose, as Mr. Molina had no alternative that would have allowed him to escape deportation because his plea negotiations were unsuccessful. BIO at 14. This is incorrect for two reasons. First, it ignores the effect of that knowledge on the plea negotiations themselves. As *amici* National Association of Criminal Defense Lawyers argued below, both Mr. Molina and his defense attorney would have been far more inclined to pursue a plea agreement had they known of these dramatic immigration consequences. Second, had Mr. Molina simply pled guilty to the charge, he would have been able to apply for 212(c) relief under current law, regardless of the sentence he received. Had he known this at the time, he might well have pleaded guilty to avoid mandatory deportation.

Finally, it is telling that the government itself repeatedly conflates the different kinds of reliance and proof requirements in its brief, thus defending positions that are inconsistent with its own regulations and further revealing the depth of the confusion at hand. For example, the government suggests that Mr. Molina should have to show an "affirmative act" of reliance in order to establish retroactive effect, BIO at 16, but the government's

regulations categorically bar people from obtaining relief if convicted by trial, regardless of what affirmative acts they may be able to show. 8 C.F.R. § 1212.3(f)(4) (2010). The government also suggests that *St. Cyr*'s rule should be limited to people convicted after November 1990, when the rule barring 212(c) relief for people serving more than five years went into effect. BIO at 12. This too is inconsistent with the government's own regulations, which authorize people convicted by plea prior to 1990 to obtain 212(c) relief. *See* 8 C.F.R. § 1212.3(f)(4)(ii) (2010).[8] Similarly, the government claims that Mr. Molina cannot make the necessary showing of reliance because he did not engage in any kind of *quid pro quo* exchange analogous to that which occurs when a defendant pleads guilty. BIO at 14 (arguing that Petitioner cannot show reliance because he "did not forgo anything" or "[give] up anything"). But reliance and *quid pro quo* exchange are two different concepts, both of which are properly understood as relevant but not dispositive in retroactivity analysis. It should be obvious that a criminal defendant who decides to exercise his right to trial relies on the maximum possible punishment when making that decision, even though he gives up nothing by going to trial.

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[8] It is also wrong, both because Mr. Molina did suffer immigration consequences as a result of his conviction at the time it occurred, *see supra* at 8-9, and because *St. Cyr*'s reasoning concerning retroactivity cannot be so narrowly limited to the facts in that case, which may be why *none* of the eleven circuits have interpreted *St. Cyr* in accord with this argument.

CONCLUSION

For these reasons and those stated in the petition, Petitioner respectfully requests that the Court grant the writ of *certiorari* in this case.

Respectfully submitted,

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